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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. M. COBBAN, E. B. WEIRICK, INDIVIDUALLY AND
ALSO AS TRUSTEE AND THE PAYETTE LUM-
BER AND MANUFACTURING COMPANY,
A CORPORATION, APPELLANTS,

VS.

MOLLIE CONKLIN, APPELLEE.

BRIEF OF APPELLANTS

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Appellant,
Residence, Boise, Idaho.

FILED

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A CORPORATION, APPELLANTS,

vs.

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STATEMENT OF THE CASE.

This suit was brought by appellee on September 7th, 1905, for the cancellation of certain deeds and powers of attorney alleged to be fraudulent and forged and to constitute a cloud upon appellee's title to approximately three thousand seven hundred and twenty-three acres of timber lands situated on the upper Payette River in Boise County, Idaho. The appellant, Payette Lumber & Manufacturing Company has held the record title to the lands referred to since May 19th, 1903, holding title under a warranty deed from appellant E. B. Weirick, Trustee, who in turn deraigned title through deeds of warranty dated and recorded in the month of September, 1901, from appellee, executed by the appellant R. M. Cobban as her attorney in fact.

An amended bill was filed April 15th, 1908. The evidence was taken in 1910 and the cause submitted to the Court in

1912. About the time appellee filed her bill the United States also filed a bill claiming title to the lands described in appellee's bill. The bill of the Government being directed against appellants and John A. Benson and Joseph C. Campbell. The two cases were consolidated and tried together, and this accounts for the reference to Campbell and Benson in several places in the record as defendants. It is important to note, however, that Campbell and Benson were not parties to the suit brought by appellee. The bill of the Government was dismissed on the authority of the decision of this Court in *United States vs. Conklin*, 177 Fed. 155.

The District Court held that the allegations of fraud and conspiracy charged in appellee's bill were wholly unwarranted and that "there is no basis for a suspicion even" of any fraud, but the Court held that the conveyances by appellant Cobban as attorney in fact of appellee, to Weirick, were unauthorized and void and it entered a decree cancelling the powers of attorney under which Cobban made the conveyances and cancelled the deeds from appellee to Weirick and from Weirick to the Payette Lumber & Manufacturing Company.

The Court also held that it would be inequitable to allow appellee to recover property worth, through the efforts of appellants, a great deal more than appellee claimed was due her under her contract with Benson through whom the sales were made to appellants, and the Court further held that appellants, who were at least innocent in fact, should be entitled to a conveyance from appellee upon paying to her the amount due her from Benson, to-wit: \$10,130.38, with interest, and that upon the failure of appellants to pay such sum within the time fixed the title would be quieted in appellee.

The facts stated more in detail are substantially as follows:

Some time prior to the year 1900 appellee's husband, now deceased, had acquired title to approximately nine thousand six hundred acres of land in Inyo and Tulare counties, California. These lands are generally referred to in the record as the "Monache lands." For legal services in connection with the title to these lands Mr. Conklin conveyed an undivided one-half interest to Patrick Reddy, his brother-in-law, who was a member of the firm of Reddy, Campbell & Metson of San Francisco. The lands were included in the Sierra Forest Reserve and under the act of Congress of June 4, 1897, (30 Stats. 36) could by the owners be conveyed to the government and an equal area of public lands outside the forest reserve selected in lieu thereof, the lands selected being generally known as "lieu lands," and the lands in the forest reserve conveyed to the government being generally known as the "base lands" or the "base."

Under the regulations of the Land Department the patents to the lieu lands were issued to the grantor of the base lands (Trans. 495) and the selection of lieu lands had to be made in the name of the grantor, either by himself personally or by his attorney in fact.

The right to select lands in lieu of lands situated in forest reserves and conveyed to the government under the said act of Congress constituted what is commonly known as "Forest Reserve Lieu Land Scrip" and in the record here frequently referred to as simply scrip. The record shows that the general custom (Trans. 262) was for the owner of land in forest reserve to convey the same to the government and to sell the right to select lieu lands instead of making such selections himself. In selling such selection right or scrip the purchaser was furnished an abstract of title to the "base lands" showing that the title thereto had been conveyed to the government free and clear of encumbrances.

He was also furnished a power of attorney to select lands in lieu of the base lands, and a power of attorney to convey the lands selected. In such cases the seller of the scrip—the former owner of the base land—had no interest in the kind or character of land that the purchaser would select, and the custom developed of issuing the power of attorney to select and the power of attorney to convey the lands selected, in blank. That is to say, the name of the attorney in fact was not inserted by the seller, neither did the seller insert the description of the lands to be selected or conveyed under such powers of attorney, but such matters were left wholly to the discretion of the purchaser of the scrip, who was in fact the only person interested in the selection.

Mr. R. M. Cobban, one of the appellants, who was himself an extensive purchaser of scrip, testifies, and his evidence is uncontradicted, that it was the universal custom so far as he knew, to purchase such scrip in blank and that it was not practicable to handle the matter in any other way, and he had personally purchased and handled some two hundred selections in that manner, and he knew that the same method was being pursued by many other large investors in such scrip (Trans. 262).

Mr. Conklin died some time prior to 1900 and his estate had been distributed to appellee prior to the negotiations hereinafter mentioned. Patrick Reddy died in the spring of 1900 and his estate was in process of administration at the time the scrip which was laid on the land in question, was purchased.

John A. Benson, a scrip dealer and land attorney of San Francisco and a friend and client of Patrick Reddy, had discussed with the latter the sale of the Monache lands and the conveyance thereof to the government for lieu land

scrip, but the negotiations were cut off by the sudden death of Mr. Reddy (Trans. 379, 380).

Joseph C. Campbell of Campbell, Metson & Campbell, was attorney for the Reddy estate and his firm had previously been attorneys for the Conklin estate. Through Campbell's instrumentality meetings were held in his office between Mr. Benson and representatives of the Reddy estate and appellee and her son, N. E. Conklin. The conflict in the evidence as to the terms of the agreement reached as to the sale of the Monache lands and numerous details connected with carrying it out, is easily understandable when it is considered that ten years had elapsed between the making of the agreement and the time this evidence was taken. The essential points, however, are reasonably clear.

Lieu land scrip at that time had a market value of about \$4.00 per acre and Benson was to receive 20c an acre for selling the land or the scrip and for preparing the necessary papers and looking after all details connected with the conversion of the base lands into scrip and the sale of the scrip, giving appellee and her co-owner \$3.80 per acre net over and above all expenses. Several meetings seem to have been held in the summer of 1900 in Mr. Campbell's office between Benson, Campbell, the representatives of the Reddy estate and appellee and her son, N. E. Conklin, who is an attorney at law and assisted his mother in the negotiations.

It is clear from the evidence that appellee and her son were present at the last meeting held in the month of August, 1900. It is clear also that the negotiations with Benson had been carried on by appellee and her son before that meeting, for on July 11, 1900, N. E. Conklin turned over to Benson the map and patents covering the Monache lands for the purpose of enabling Benson to check up the description and examine the title and prepare the necessary deeds conveying the lands to the government (Complainant's Ex-

hibit "W," Trans. 467), thus clearly proving that appellee and her son were fully aware of the proposed exchange of the base lands.

Benson testifies positively that he and Mr. Conklin discussed fully the form of deed to the United States and the other papers that would be required to clear the title to the land, and that while the descriptions were being checked over and the deeds prepared, a period of several days or weeks, Mr. Conklin was a frequent visitor at Mr. Benson's office (Trans. 387, 389, 390, 419, 440). Mr. Benson first thought these meetings were after the meeting in August held in Mr. Campbell's office at which all parties were present and the final agreement arrived at, but he later corrected his testimony on this point and stated that the conferences in his office with Mr. Conklin over the form of the papers and the matters required to clear the title were before the final meeting in Mr. Campbell's office (Trans. 420, 436, 440, 442, 452 and 453). In this he is strongly corroborated by J. H. Laveson (Trans. 365, 366) and Miss Glover, the clerks who assisted Mr. Conklin in checking over the description and preparing the deeds (Trans. 370, 372, 374), and by the fact that the papers were explained to the notary, Holland Smith, at the interview in August when all parties were present (Trans. 440).

Appellee testified that she thought that the lands were to be deeded directly to Benson and that she did not know when she signed the deeds that she was conveying the lands to the government, but the evidence shows clearly and the trial court so held, that the agreement between the parties was that the owners of the Monache lands should deed them to the government and that Benson would sell the right to select lieu lands in accordance with the usual practice of selling forest reserve lieu land scrip.

The trial court found that this agreement contemplated that the title papers, when executed, should be deposited in the Anglo Californian Bank in escrow, and withdrawn as Benson paid the agreed price (Trans. 512, 513), but no such deposit was made (Complainant's Exhibit "S").

The trial court in this matter, however, entirely overlooked the importance of the evidence as to the act of June 6th, 1900, which became effective October 1st, 1900, limiting the right of lieu land selections to surveyed land (Trans. 391, 392). Under this act the scrip could only be used on surveyed land unless the base lands were conveyed to the government before October 1st, 1900, and this could not be done if the papers were simply placed in escrow. Benson's testimony that the papers were not to be placed in escrow is strongly corroborated by the surrounding circumstances and we think it is clear from the evidence that it was the purpose of all parties to expedite the matter of executing the deeds to the government so that they could be recorded prior to October 1st, 1900, thereby saving a valuable right to the owners and adding to the value or salableness of the scrip.

There is some dispute as to the precise relation in which Campbell stood to appellee. She claims that he was her attorney, but the court held that while he was not strictly her attorney he nevertheless stood in some sort of fiduciary relation to her (Trans. 500). Campbell, on the other hand, denies that he acted in these transactions in any capacity other than as attorney for the Reddy estate.

Benson, with the assistance of N. E. Conklin, prepared the deeds conveying the Monache lands to the United States, also the applications to select with the descriptions in blank, and the powers of attorney to select in case the original selections failed, also the powers of attorney to convey the selected lands, with the name and address of the attorney-in-fact

in blank. These powers of attorney were of a printed form apparently especially prepared by Mr. Benson for use in his scrip business. Many of the originals were introduced in evidence and have by the court been certified to this court for use upon the appeal.

These papers when ready for execution, were sent by Mr. Benson's office to Mr. Campbell's office for execution by the representatives of the Reddy estate and by appellee. A messenger from Mr. Campbell's office took the papers to the residence of the parties who were to execute them. Appellee claims that she signed the papers without examining more than a few of them and those that she examined were deeds, and she thereupon assumed that all the papers were deeds and that they were proper for her to execute, because she understood they had been sent to her from Mr. Campbell's office. She claims the acknowledgments were false and that she did not acknowledge any of them before a notary public or other officer. The court held that the truth or falsity of the acknowledgment was immaterial in this suit, as appellee had ratified the deeds to the government by bringing this suit to recover the lieu lands patented to her in lieu of the base lands, and that the only question in this case was as to the validity of the powers of attorney to convey the selected lands and the validity of the conveyances made under such powers of attorney. Appellee testified that the papers, after being signed by her, were delivered to a messenger, presumably from Campbell's office, but the papers eventually came into the possession of Benson, who it is conceded had full control over them at all times. There was no written agreement between the parties.

Appellant Cobban, a resident of Missoula, Montana, and appellant Weirick of Butte, and certain associates not parties to this suit residing in that vicinity, formed a syndicate about 1900 or 1901 for the purpose of acquiring timber

lands through the purchase of scrip. Neither Cobban nor any of his associates personally knew Benson, Campbell, the Conklins, or the Reddys (Trans. 496), but Mr. Cobban learned in some way that Mr. Benson had scrip for sale and he communicated with him by mail and wire for the purchase of several lots of scrip. The scrip so purchased from Benson included 3,729.52 acres of the Monache base lands which had been conveyed to the government by appellee. This scrip was purchased by Cobban at the market price of \$4.00 per acre.

The procedure was as follows: Cobban would wire or write for the amount of scrip required, then Benson would forward to some bank in Boise or Butte the papers required, consisting of a deed, which had been duly recorded, conveying the base land to the United States, an abstract showing clear title to the base land in the United States, an application to select undescribed lands, an irrevocable power of attorney to convey such lands and supplemental powers of attorney to select if the first selection failed. After an examination of the abstract by Cobban, or his representative, he would pay the money to the bank, take all the papers, fill in the application to select with a description of the desired lieu lands and file it with the deed and abstract in the Boise Land Office; and at the same time, or subsequently, he would insert or cause to be inserted his own name as attorney in fact in the power of attorney to convey the selected land (Trans. 259-261-270).

At this point it is important to note that Cobban testified squarely that he had received a large number of powers of attorney with his name and address printed therein, authorizing him to post notice, etc., which were signed by Mollie Conklin and the Reddys, and sent him by Benson subsequently to his original purchase of the scrip (Trans. 278, 279).

These selections were made in the spring of 1901 (Trans. 252), and patents were issued in August or September, 1902 (Trans. 158), and about the time that patents issued Cobban conveyed by warranty deed the parcels so patented to E. B. Weirick, Trustee (Trans. 253, 498).

The members of the syndicate for whom Weirick acted as trustee are enumerated at page 244.

Later, appellants, Weirick and Cobban, acting for the syndicate, gave an option to Mr. Musser or Mr. Deary, which was later assigned to the Payette Lumber & Manufacturing Company (Trans. 254). On the 19th of May, 1903, the lands involved in the suit were conveyed by warranty deed from Weirick to the Payette Lumber & Manufacturing Company (Defendants' Exhibit "A"). On January 3rd, 1903, some five months before the deed to appellant Payette Lumber & Manufacturing Company, was made, but about a year and a half after the lands had been deeded to Weirick, appellee executed what purported to be a general revocation of all powers of attorney previously executed by her and this was recorded in Boise County, Idaho, where the lands in question are situated, on January 16th, 1903 (Complainant's Exhibit "T"). This revocation is general in form and specifies in particular only a power of attorney given to one C. L. Hovey, and makes no reference to Cobban or powers of attorney standing in his name.

The evidence is perfectly clear that for some time prior to the execution and recording of this revocation appellee and her general agent and attorney, Mr. N. E. Conklin, knew that Cobban had selected lands in Boise County in lieu of the Monache lands, and held powers of attorney to convey these lands.

Mr. Conklin began investigating the Monache transactions in December, 1901, and in July, 1902, he was sent a list by an attorney in Washington of the lieu lands selected

in his mother's name and the names of the persons who held powers of attorney for her (Trans. 214, 215, 238). His testimony is somewhat confused as to whether he actually knew that Cobban had powers of attorney to convey lands in Idaho before October, 1903, but on the whole the evidence shows such knowledge (Trans. 225, 226). Furthermore these powers of attorney were recorded in Boise County, Idaho, in the year 1901 and he knew that large tracts of lieu lands had been selected in that county. He made no attempt to find out anything about these powers until late in 1903 when he secured certified copies of the Cobban powers of attorney (Trans. 226). The evidence clearly shows both actual and constructive notice by appellee that Cobban held powers of attorney to convey the Idaho lands at the time this purported revocation was recorded.

It is conceded that Cobban and his associates paid in cash at the time of the delivery to Cobban of the Monache scrip the full purchase price of \$4.00 per acre, and that Benson paid appellee only \$2,750.00 as her share, while he paid the Reddy estate over \$13,000.00, making an aggregate payment by Benson to the Reddy estate and appellee of about \$15,900.00 (Trans. 392, 395, 423).

Some of these payments were made by Benson before and some after Cobban purchased. The reason why more was paid to the Reddy estate than to appellee appears to be due to the fact that the representatives of the Reddy estate were endeavoring to carry out their part of the transactions with Benson while appellee and her son were placing numerous obstacles in the way of approving the title to the base lands by the Land Department, thereby delaying the issuance of patent on the new scrip selections, all of which caused expense and embarrassment to Benson, and appellee also notified Benson in April, 1903, (Trans. 484, Exhibit

“U-I”) that she would accept no more money on the transaction.

The District Court found that the charges of fraud and conspiracy against appellants were absolutely groundless and that they were innocent in fact, but it held that the powers of attorney and deeds should be cancelled because Cobban had no authority to insert his own name in the powers of attorney and then convey as the attorney in fact of appellee, and that Campbell was in a position analogous to that of an escrow holder and that the delivery by him of the deeds and papers to Benson, except through the Anglo California Bank, was in violation of appellee's instructions and rendered the instruments void or ineffectual for transferring title from appellee to appellants, even though appellants Weirick and the Payette Lumber & Manufacturing Company are in fact innocent purchasers for value, purchasing without knowledge of the assumed secret limitations on Campbell's and Benson's authority in the premises.

Appellee urged the same questions in this Court in *United States v. Conklin*, 177 Fed. 55, and before the Supreme Court of California in *Conklin v. Benson*, 159 Cal. 789, 116 Pac. 34, and both courts on substantially the same record and the same evidence now before the Court, held adversely to appellee's contentions.

SPECIFICATION OF ERRORS.

Appellants assign the following errors on this appeal:

That appellee did not show that appellants, or any or either of them, were guilty of any fraud or wrongdoing in purchasing or acquiring the land in the State of Idaho, which appellee sought to recover in her bill of complaint, or in purchasing or acquiring the scrip, deeds or

powers of attorney under which or through which appellants, or either of them, claim title to said land. And appellee failed to show any collusion, confederation or conspiracy between these appellants, or either of them, and any other person or persons whomsoever for the purpose of acquiring title to said lands or defrauding appellee thereof.

2. That appellee had been guilty of laches and was not entitled to equitable relief, or any relief, in said suit.

3. That the appellant, Payette Lumber & Manufacturing Company, was a *bona fide* purchaser for a valuable consideration, without notice of any claim of appellee.

4. That the appellants, R. M. Cobban and E. B. Weirick, individually and as Trustee, were the *bona fide* purchasers, in good faith, for a valuable consideration of all the right, title and interest of appellee in the California lands, known as the "Monache" lands, and of the lands in the State of Idaho which appellee in her bill of complaint seeks to recover in this suit.

5. That if any wrong, injury or damage has been sustained by appellee under the record in this cause, it was due to her own laches, carelessness and negligence, and not through any fault or wrongful act of these appellants, or any or either of them.

6. That the decree and the relief granted appellee is not within the issues framed by the pleadings, and is not sustained by the record, and is inequitable and unjust to these appellants.

7. That the District Court erred in ordering, adjudging and decreeing that the powers of attorney from appellee, Mollie Conklin, and described in her amended bill of complaint and in said decree, appointing the appellant R. M. Cobban as attorney in fact for said appellee be annulled, cancelled and declared utterly void and of no effect.

8. That the District Court erred in ordering, adjudging and decreeing that all warranty deeds purporting to have been executed for and on behalf of appellee by the appellant R. M. Cobban, as her attorney in fact, be annulled, cancelled and declared to be utterly void and of no effect.

9. Because the District Court erred in ordering, adjudging and decreeing that the warranty deed dated May 19, 1903, from appellant Weirick, as Trustee, to the appellant Payette Lumber & Manufacturing Company be cancelled, annulled and declared void and of no effect.

10. That the District Court erred in decreeing that these appellants, or either of them, had no right, title or interest in the lands described in the decree and situated in the State of Idaho.

11. That the District Court erred in adjudging and decreeing that these appellants should pay to appellee the sum of Ten Thousand One Hundred Thirty and 38-100 Dollars (\$10,130.38), with interest at seven per cent (7%) per annum, and costs of suit before they would be entitled to hold or enjoy the lands described in the decree.

12. That the District Court erred in its decision in holding and concluding that appellee did not acknowledge before a notary public the instruments through which appellants deraign title to the land in question.

13. That the District Court erred in its decision in holding and concluding that there was no evidence in the record to support the theory that appellee ever authorized or ratified the delivery of any power of attorney to "convey," without the prior payment to her of the full purchase price agreed upon.

14. That the District Court erred in its decision in holding and concluding that appellee neither expressly nor impliedly authorized the delivery to Benson of the instruments

executed by her for the purpose of conveying the said Monache Lands, or lands selected in lieu thereof.

15. That the District Court erred in its decision in holding and concluding that the delivery of the instruments executed by appellee was not in accordance with the authorization or consent of appellee or anyone authorized to act for her.

16. That the District Court erred in its decision in holding and concluding that appellee did not know and had no reason to suspect that the powers of attorney in question had been delivered to Benson until after the sale to these appellants had been consummated, and that she acted with reasonable diligence in apprising appellants of her repudiation of the acts of Benson and others acting for her in delivering said instruments.

17. That the District Court erred in its decision in holding and concluding that the revocation of the powers of attorney, filed January 16, 1903, in any way affected the rights of these appellants.

18. That the District Court erred in its decision in holding and concluding that appellee had neither expressly nor impliedly ratified the delivery of the instruments, through which appellants deraign title, or proclaimed in a proper manner with reasonable diligence her unwillingness to be bound thereby.

19. That the District Court erred in its decision in holding and concluding that appellee would have accepted payment for the lands in question, or the so-called Monache lands, at \$1.90 per acre for her undivided one-half interest from the said Benson during the years 1901 and 1902.

20. That the District Court erred in its decision in holding and concluding that the course pursued by appellee in her dealings with Benson and Campbell, and in other matters leading up to the commencement of this suit, was not

such as to debar appellee from seeking relief in a court of equity.

21. That the District Court erred in its decision in holding and concluding that neither of these appellants are protected under the rule, that where one of two innocent persons must bear the loss due to the injurious act of another, he must sustain the loss who has put it within the power of such other person to do the wrong.

22. That the District Court erred in its decision in holding and concluding that the power of attorney delivered to appellant Cobban, and executed by appellee, did not operate to confer upon said appellant the power to convey the land in question.

23. That the District Court erred in its decision in holding and concluding that the appellant Cobban did not, under the facts and circumstances disclosed by the record in this case, have authority to insert his name in the powers of attorney executed by appellee.

24. That the District Court erred in its decision in holding and concluding that the payments by appellant Cobban and his associates to Benson are in no way binding upon appellee, and that said Benson was not the agent of appellee.

25. That the District Court erred in its decision in holding and concluding that the said Benson was as much the agent of the appellant Cobban as of the appellee.

26. That the District Court erred in its decision in holding and concluding that the instruments executed by appellee and delivered to the appellant Cobban and his associates by Benson upon payment of the stipulated purchase price, and through which title is deraigned by these appellants to the lands in question, were inoperative for any reason.

27. That the District Court erred in its decision in holding and concluding that Benson was to receive possession

of the deeds and instruments in question only after he had paid in full the purchase price, and that these appellants were bound to know such fact and to know that said instruments had not been delivered by appellee, either in accordance with her agreement with Benson and Campbell, or otherwise.

28. That the District Court erred in its decision in holding and concluding that Campbell was the attorney or agent of appellee for any purpose.

29. That the District Court erred in its decision in holding and concluding that in purchasing the scrip in question appellants did not exercise due or proper care and caution.

30. That the District Court erred in its decision in holding and concluding that the universal custom, in handling scrip of the kind in question, of permitting the purchaser to insert in the powers of attorney to select and to convey the name of an agent of his own selection, would not operate to protect these appellants in the purchase of the scrip in question.

31. That the District Court erred in its decision in holding and concluding that the fact that the Reddy estate owned the other undivided one-half interest in the lands in question, would in any way or for any purpose put these appellants, or either of them, on notice of any of the fraudulent acts alleged to have been committed against appellee, or that the instruments executed by her had been executed unwittingly or unintentionally, and had not intentionally been delivered by appellee.

POINTS AND AUTHORITIES.

Where a bill in equity sets up actual fraud and makes that the ground of the prayer for relief, the complainant will not be entitled to a decree if he fails to prove the fraud but establishes other facts incidentally alleged, which might

of themselves create a cause of action under a totally distinct head of equity.

16 Cyc. 486.

Eyre v. Potter, 15 How. 42, 56; 14 L. Ed. 592.

Price v. Berrington, 3 Mac. & G. 486, 42 Eng. Rep 348.

Curson v. Belworthy, 3 H. L. C. 742, 10 Eng. Rep. 294.

Ferraby v. Hobson, 2 Phill. (22 Eng. Chanc. Rep.) 255.

Montesquieu v. Sandys, 18 Ves. Jr., 313.

Powys v. Mansfield, 6 Sim. 565.

Hoyt v. Hoyt, 27 N. J. Eq. 399.

Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

This rule is not an arbitrary and technical rule of pleading, but is based primarily on the principle that parties who impute fraud, dishonesty, and corruption to their opponents assume a great responsibility and ought to be required to sustain these allegations by their proof, or lose their right to relief.

Wilde v. Gibson, 1 H. L. C. 604, 9 Eng. Rep. 697.
Glascott v. Lang, 2 Phill. (22 Eng. Chanc. Rep.) 310.

Tillinghast v. Champlin, *supra*.

Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 334.

Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801.

Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. 1063.

The allegations and the proof must correspond and the relief given must be according to both.

Beach, Modern Equity Prc. Sec. 99.

Wilde v. Gibson, *Supra*.

Doggett v. Simms, 79 Ga. 253, 4 S. E. 909.

Hendryx v. Perkins, *supra*.

The theory on which the bill of complaint is based can not be changed after the trial and argument, because to do so would deprive defendants of the opportunity to make their defense.

16 Cyc. 485.

Rejall v. Greenhood, 35 C. C. A. 97, 92 Fed. 945.

Tillinghast v. Champlin, *supra*.

Wilde v. Gibson, *supra*.

The Federal Courts are unanimous in denying relief to parties who found their bill on fraud and, having failed to prove fraud, seek relief on other grounds.

Eyre v. Potter, 15 How. 42, 56; 14 L. Ed. 592.

Putnam v. Day, 22 Wall. 60, 66; 22 L. Ed. 764.

C. B. & Q. R. Co. v. Babcock, 204 U. S. 585, 593;
51 L. Ed. 638.

French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed.
852.

Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed.
434.

Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed.
801.

Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209.

Spies v. C. & E. Ry Co., 40 Fed. 34, 6 L. R. A.
565.

Fisher v. Boody, 1 Curt, 206, Fed. Cas. No. 4814.

Britton v. Brewster, 2 Fed. 160.

Badger v. Badger, Fed. Cas. No. 718.

Bradley v. Converse, Fed. Cas. No. 1775.

The same rule obtains in numerous state courts, especially in those states where the distinction between law and equity is still maintained.

Mt. Vernon Bank v. Stone, 2 R. I. 109, 57 Am.
Dec. 709.

O'Conner v. O'Conner, 20 R. I. 257, 38 Atl. 370.
 Nichols v. Rosenfeld, 181 Mass. 525, 63. N. E.
 1063.
 Craige v. Craige, 41 N. Car. 191.
 Rakestraw v. Brogden, 56 Ga. 549.
 Vennum v. Vennum, 61 Ill. 331.
 Robinson v. Cullom Co., 41 Ala. 693.
 Elyton Land Co. v. Iron City Steam Bottling
 Works, 109 Ala. 602, 20 So. 51.
 McMichael v. Kilmer, 76 N. Y. 36.
 Brown v. Bulkley, 14 N. J. Eq. 450.
 Pasman v. Montague, 30 N. J. Eq. 385.
 Keen v. Maple Shade Land & Imp. Co., 61 N. J.
 Eq. 497.

Bills to quiet title or remove clouds on title can only be maintained in the Federal Courts where the plaintiff is in possession, or the land is vacant and unoccupied.

Whitehead v. Shattuck, 138 U. S. 146, 34 L. Ed.
 873.
 Lawson v. U. S. Min. Co., 207 U. S. 1, 52 L. Ed.
 65.
 Stockton v. O. S. L. Ry. Co., 170 Fed. 626.
 Whitehouse v. Jones, 12 L. R. A. (N. S.) 76, note.

Parol authority is sufficient to authorize the filling of blanks in deeds, bonds, powers of attorney and other instruments after execution.

Drury v. Foster, 69 U. S. 24, 17 L. Ed, 780
 3 Enc. L. & P. 431, 432.
 Bridgeport Bank v. New York etc. R. Co., 30 Conn.
 231, 274.
 McClung v. Steen, 32 Fed. 373, 376.
 Executors of Lamar v. Simpson, 1 Rich. Eq. (S.
 C.) 71, 42 Am. Dec. 345.
 McCleary v. Wakefield, 76 Ia. 529, 2 L. R. A. 529.
 Swartz v. Ballou, 47 Iowa 188, 29 Am. Rep. 470.

- Creveling v. Banta, 138 Iowa 47, 115 N. W. 598.
 Exchange Nat. Bank v. Fleming, 63 Kan. 139, 65
 Pac. 213.
 Field v. Stagg, 52 Mo. 535, 14 Am. Rep. 435.
 Thummel v. Holden, 149 Mo. 677, 51 S. W. 404.
 Carr v. McColgan, 100 Md. 462.
 Cribben v. Deal, 21 Ore. 211, 27 Pac. 1046.
 Mason Lumber Co. v. Collier, 74 Mich. 241, 41 N.
 W. 913.
 Stahl v. Berger, 10 S. & R. 170, 13 Am. Dec. 660.
 Herr v. Denver M. & M. Co., 13 Colo. 406, 22 Pac.
 770.
 Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.
 Bulkley v. Devine, 27 Ill. App. 145.
 Phelps v. Colquitt, 73 Ga. 59, 54 Am. Rep. 867.
 Johnson Harvester Co. v. McLean, 57 Wis. 258,
 46 Am. Rep. 39.
 Clemmons v. McGeer, (Wash.) 115 Pac. 1081.

Authority to fill such blanks may be implied from circumstances, and possession and control of an otherwise duly executed instrument containing blanks necessarily implies an authority in the holder thereof, or his appointee, to fill out the blanks.

- 2 Cyc. 159, 160.
 3 Enc. L. & P. 433, 435.
 Commercial Bank v. Kortright, 22 Wend. 348, 34
 Am. Dec. 317.
 Inhabitants of South Berwick v. Huntress, 53 Me.
 89, 87 Am. Dec. 535.
 Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209.
 Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep.
 486.
 Friend v. Ward & Yahr, 126 Wis. 291, 1 L. R.
 A. (N. S.) 891.
 Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182.
 Clemmons v. McGeer, (Wash.) 115 Pac. 1081.
 Reed v. Morton, 24 Neb. 760, 1 L. R. A. 736.

State v. Matthews, 24 Kan. 596, 25 Pac. 36.
 Guthrie v. Field (Kan.) 116 Pac. 217.
 Chapman v. Veach, (Kan.) 4 Pac. 100.
 Eagleton v. Gutheridge, 11 M. & W. 465.
 State v. Young, 23 Minn. 551.
 Leavitt v. Fisher, 4 Duer 1 (N. Y.)
 White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437.

Authority to fill blanks in powers of attorney will be implied from the fact that they are in the possession and control of an agent, and this implication is strengthened by evidence of custom or commercial usage in relation to such powers.

Commercial Bank v. Kortright, *supra*.
 Eagleton v. Gutheridge, *supra*.
 Vliet v. Camp, 13 Wis. 198.
 Markham v. Comaston, Moore (K. B.) 547.

Knowledge of the fact that the instrument was executed in blank does not give the party taking it notice of limitations on the authority, nor put him on inquiry as to the extent of the authority.

2 Cyc. 162.
 Commercial Bank v. Kortright, *supra*.
 Burk v. Johnson, 146 Fed. 209.
 Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182.

The fact that the blanks are filled up in violation of the authority does not impair the validity of the instrument in any way, because parties who deal with the agent are entitled to rely on his apparent authority.

2 Enc. L. & P. 440, 442, and cases cited.
 Inhabitants of South Berwick v. Huntress, 53 Me. 89, 87. Am. Dec. 535.
 Chicago v. Gage, *supra*.
 Clemmons v. McGeer (Wash), 115 Pac. 1081.
 Guthrie v. Field (Kan.), 116 Pac. 217.

Where negotiable instruments are executed with blanks as to the name of payee, place of payment, etc., a bona fide holder who fills the blanks will be protected on the ground that he had implied authority to fill them.

Angle v. Insurance Co., 92 U. S. 330, 23 L. Ed. 556.

Michigan Ins. Bank v. Eldred, 9 Wall. 554, 19 L. Ed. 763.

First Nat. Bank v. Barnum, 160 Fed. 245.

Cox v. Alexander, 30 Ore. 438, 46 Pac. 794.

Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573.

Nat. Exchange Bank v. Lester, 194 N. Y. 461, 21 L. R. A. (N. S.) 402.

Appellant Cobban bought and paid for the right to select the lieu lands, and as neither appellee nor Benson had any beneficial interest therein after his purchase he was fully authorized to insert his name in the powers of attorney to convey, and to convey as attorney in fact of appellee.

Authorities cited *supra*.

Appellee cannot ratify the act of her agent insofar as it benefits her and repudiate or disaffirm the part which may not be for her benefit. The ratification or disaffirmance must be *in toto*.

Rader v. Maddox, 150 U. S. 128, 37 L. Ed. 1025.

Egbert v. Sun Co., 126 Fed. 568.

Sutherland v. Ill. Cent. R. Co., 81 C. C. A. 620, 152 Fed. 694.

Clark & Skyles on Agency, Sec. 108.

2 Enc. L. & P. 862, and cases cited in notes.

Appellant, The Payette Lumber & Manufacturing Co., was a bona fide purchaser for value and without notice,

actual or constructive, of any equities or claims of the appellee and took the legal title free from all such equities or claims.

Guthrie v. Field, (Kans.), 116 Pac. 217.

The so called "revocation of powers of attorney" could not possibly operate as constructive notice of any defect in the authority of the appellant, Cobban, because it was not recorded until long after the power vested in him had been fully executed and it was, therefore, entirely outside of the chain of title of appellant company.

People v. North River Sugar Refining Co., 121 N.

Y. 582; 9 L. R. A. 33;

Revised Codes of Idaho, Sections 3149, 3154, 3159 to 3162.

Harris v. Reed, 21 Idaho 364; 121 Pac. 780;

Satterfield v. Malone, 15 Fed. 445; 1 LRA. 35;

Boynton v. Haggart, 57 C. C. A. 301; 120 Fed. 819;

Ely v. Wilcox, 30 Wis. 523; 91 Am. Dec. 436;

McLanahan v. Reeside, 9 Watts 508; 36 Am. Dec. 136;

Blake v. Graham, 6 O. Sta. 580; 67 Am. Dec. 360;

Ford v. Unity Church Society, 120 Mo. 498; 23

L. R. A. 561; and cases cited in note.

Somes v. Brewer, 2 Pick. 184; 13 Am. Dec. 406;

Calder v. Chapman, 52 Pa. 359; 9 Am. Dec. 163;

Woods v. Farmere, 7 Watts 382; 32 Am. Dec. 772;

Board of Education of Minneapolis v. Hughes (Minn.), 136 N. W. 1095;

Richardson v. Atlantic Coast Lumber Company, 75 S. E. 371;

Perkins v. Cissell, (Okla.), 124 Pac. 7;

White v. McGregor, 92 Tex. 556; 50 S. W. 564.

Fullenwider v. Ferguson, 30 Tex. Civ. Appeals, 156; 70 S. W. 222;

Treadwell v. Inslee, 120 N. Y. 458; 24 N. E. 651.

The recording acts do not require a purchaser to look one day or one page beyond that which contains the title of his grantor, and in this case the appellant company was not required to search for or charged with notice of revocation of Cobban's agency filed for record after the deed to Weirick was recorded.

Connecticut v. Bradish, 14 Mass. 296;
 Losey v. Simpson, 11 N. J. Eq. 246;
 McLanahan v. Reeside, Watts 508; 36 Am. Dec.
 360;
 Corbin v. Sullivan, 47 Ind. 356 and cases cited
supra.

Record title and possession constitute complete *indicia* of absolute ownership, and the law does not require a purchaser to make further inquiry.

Quick v. Milligan, 108 Ind. 419.
 Blight v. Schneck, 10 Penn. St. 285.
 Hubbard v. Greeley, 84 Me. 340.

Public records import absolute verity and are presumed to be correct. They are not designed to mislead and the presumption is that deeds which appear to have been duly recorded have been delivered by the grantors therein named, and a *bona fide* purchaser, relying upon the records, is protected against wrongful deliveries by escrow holders.

Cases cited *supra* and
 Moore v. Trott, 156 Calif. 353; 104 Pac. 578.
 Fletcher v. Peck; 6 Cranch 87, 133;
 Somes v. Brewer, 2 Pick. 184;
 24 A. & E. Enc. L. 187.
 34 Cyc. 614;
 1 Washburn on Real Prop. 35, 95.

ARGUMENT.

Appellee, complainant below, came into court recklessly and heedlessly charging fraud and conspiracy to rob and defraud her of the Monache lands, against all persons with whom she had had any dealing or who had been connected in any degree with the title to the lieu lands selected in the State of Idaho. No one was exempted, but all were included in the wholesale charge of fraud on which the bill was founded. On these charges issue was joined by appellants, and the court found that the charges were wholly unfounded.

The Court said on this matter (trans. 499) :

“Moreover, there is no substantial foundation for the charge, elaborated at great length in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains.”

The court also found, and it could not under the evidence do otherwise, that the charges against Mr. Campbell were equally unjust and unfounded. From the evidence in the record there would seem to be just ground for the belief that the charges of fraud and conspiracy were not made in good faith. The most that can be said in behalf of appellee as to these charges is that she unjustly ac-

cused innocent parties with a recklessness that should not be lightly condoned by the courts.

The district court, (no doubt unconsciously affected by the general notoriety which Benson has received in late years through litigation with the government and others concerning scrip selections), was not prepared to say that Mr. Benson was entirely free from criticism. This conclusion of the court seems to rest on a letter of December 11th, 1901, written by Mr. Benson to Mr. Campbell (Trans. 476-478, Exhibit "N-1"). While we are not defending Benson, we feel nevertheless that the trial court did Mr. Benson an injustice, for the letter referred to is not inconsistent with the agreement as Benson understood it. There is no attempt in this letter to conceal the fact that the lands had been deeded to the government under the lieu land selection act and that the scrip was being sold. He says:

"All of the land, except 400 acres, has been deeded to the United States, and deeds placed on record, and selections made of other land in accordance with the provisions of the Act of Congress of June 4, 1897 (30 Stats., 36).

This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements which in terms provided that after the land selected in lieu of the land surrendered had been located and said location had been accepted by the Commissioner of the General Land Office, and proper evidence furnished thereof, that the parties in whose interests the locations were made would, upon the delivery of a deed conveying the right to the owners, pay the amounts agreed upon.

Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these

acceptances can be had to ask for a confirmation of the sale by the Court so that settlements can be made to both the owners and the parties in whose interests the locations were made. We have been bringing every effort to bear to get the Commissioner of the General Land Office to act upon these matters, and as he has lately added several to the working force in his office it is likely we will not have very much longer to wait.

' * * * * *

The Commissioner also refuses to allow the withdrawal of selections already made until the present ones are acted upon, giving as a reason in similar instances, that the locator might desire to select more valuable lands than those selected at present.

At the time these locations were made there was little or no sale for Forest Reserve direct except upon the condition that it were accepted by the Commissioner of the General Land Office. At present if we could only get back the deeds given to the United States there would be little difficulty in disposing of the land.

I have employed counsel specially at Washington to try and secure these approvals and just as soon as obtained, so as to get confirmation of sales will report promptly.

I regret exceedingly these complications, but I had no reason to expect them, as at the time the locations were made approvals were progressing rapidly. I have many times this amount of locations in my own business delayed in a similar manner."

It is true that Benson says in his letter that all, "or nearly all' scrip sold, based on this land, had been sold under agreements under which the purchaser was not to pay until the scrip had been approved by the government; that is to say, until the government had approved the exchange, or the title to the Monache lands. There is nothing in the evidence to show that the particular scrip sold to Mr. Cobban was protected by such agreement, but it is reasonable

to presume that if the government had not accepted the scrip Mr. Cobban would have demanded a return of his money from Mr. Benson, and Mr. Benson, in order to protect himself, naturally hesitated to pay over the money to Mrs. Conklin or the owners of the base lands until the scrip was approved. If he turned it over before and the scrip should be rejected by the government, Mrs. Conklin and her associates would not only have the money which they had received for the scrip, but they would also hold the base lands which the government declined to accept. Benson could not protect himself against such contingencies without retaining the money until the General Land Office approved the scrip selections. If they were rejected he could refund the money to the purchaser of the scrip, and Mrs. Conklin and her associates would be exactly in the position they were before the scrip was sold—they would still have the base lands which the government had declined to accept.

Mr. Benson's letter shows clearly that he was not trying to conceal the fact that the papers were not in escrow, and that he was selling the scrip as fast as he could find a buyer and that a large part of it had in fact been sold. It shows that he was employing counsel at his own expense in an effort to secure an early approval of the scrip selections by the government.

This letter was transmitted by Mr. Campbell to appellee on the same date (Trans. 475) and we respectfully submit that there is nothing in this correspondence, or any correspondence found in the record, to justify the suspicion of appellee and her son that there was a criminal conspiracy to cheat and defraud her on the part of Benson. The record, on the contrary, shows that Benson was induced to advance money out of his own pocket to appellee and her co-owner before he sold any of the scrip (Tr. 352-3, 392).

The record further shows that appellee in April, 1903, (Tr. 484) repudiated her contract and in effect declined to accept any further payments, but on the contrary offered on certain conditions, which it was impossible to comply with, to return the money which she had previously received.

It is also conceded that appellee and her son, since about the middle of December, 1901, have done every thing in their power to induce the government to reject lieu land selections based on the Monache scrip, and as a result of this Benson and the purchasers of the scrip became involved in expensive and protracted complications with the land department, and payment for the scrip was delayed accordingly. Appellee and her son have not co-operated in any sense in carrying out the agreement with Benson, but on the contrary have done everything in their power to embarrass both Benson and those who purchased the scrip.

Mr. Cobban did not purchase the Monache lands from appellee, neither did he purchase the Idaho lands selected in lieu thereof, but he purchased the *right of selection*, commonly known as scrip. Having purchased such right to select, or the scrip, he had the right to insert in the so-called powers of attorney the name of the agent who should select the Idaho lands, and he had the right to fix the terms and prices upon which such lands should be sold. Clearly, appellee had no interest in such selections or in such agency, for when Cobban paid for the scrip the interest of appellee ceased, not only in the scrip, but in the selections to be made, and while the selections were made in her name as principal that was at most but a fiction in order to satisfy the regulations of the department that the selections should be made and patents issued in the name of the person who conveyed the base to the government.

Cobban conveyed for a valuable consideration under a warranty deed to Weirick, and neither Cobban nor Weirick had any knowledge of the irregularities complained of by Mrs. Conklin. Weirick conveyed to the Payette Lumber & Manufacturing Company, and it purchased upon the records showing clear title in Weirick. None of the appellants had actual notice of any of the things complained of.

Appellee, although she claims to have become suspicious of a gigantic conspiracy to defraud her as early as the latter part of 1901, and although she knew in 1902 that lieu lands had been selected in her name in Boise County, Idaho, commenced no action to recover the lands or to assert her rights therein until September 7th, 1905, when the original bill in this suit was filed, and since the suit was filed she has been guilty of gross delays in prosecuting it. She has been content to let appellants pay the taxes and patrol the timber and protect it from destruction by fire and other agencies. She has been guilty of laches, and she comes into Court without offering to do equity or without offering to reimburse appellants for the moneys expended in the payment of taxes and in caring for and protecting the timber on the lands to which she now claims title. Her laches and her conduct from the beginning have been such that she is not entitled to equitable relief.

She instigated suits on the part of the government and commenced suits in the California courts, all of which have been decided adversely to her contentions, but she has brought no suit or action against the alleged unfaithful agent to recover the amount due her on the purchase price, and she delayed bringing any suit against these appellants until nearly all the witnesses to the original transactions were dead.

Appellants are innocent in the premises and the wrongs, if any, which have been sustained by appellee have resulted directly from her own negligence and carelessness in relying upon verbal agreements when they should have been in writing, and in doing business through agents which she claims have been unfaithful and unworthy of trust or confidence.

The only equity advanced on behalf of appellee is that she has not received all of the purchase money, but the equity of appellants on that point is at least equal, for they have *paid* the entire purchase price to the agent selected by appellee; besides they are innocent purchasers under the recording laws.

It is a wholesome maxim, and it applies here with all its force, that where one of two innocent persons must suffer a loss, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. The party who enables another to commit a fraud is answerable for the consequences.

We have endeavored to classify some of the principal points involved in the case and we pass now to a consideration of those points.

Complainant Cannot Found Her Bill Solely on Fraud and Conspiracy and Recover on Some Inferior Ground of Relief.

The whole frame and texture of complainant's bill in the case at bar was fraud and conspiracy on the part of John A. Benson, Joseph C. Campbell, Appellants Cobban and Weirick, and the promoting stockholders of the Payette Lumber & Manufacturing Company. The trial court completely absolved appellants from every suspicion of fraud and conspiracy but it granted the relief prayed for on other grounds, and upon a different theory than that on which

the case was tried. This we respectfully submit was error. When a complainant plants his bill on the ground of fraud and conspiracy, he cannot recover on other grounds. This is sternly forbidden by the settled rules of equity pleading and practice. Several reasons have been assigned for the rule.

In the first place, charges of fraud and the like, imputing evil motives and moral turpitude are not to be lightly or recklessly made in courts of equity, and when made, such charges must be proved or the plaintiff will lose his case as a penalty for having made his bill an instrument of unfounded slander against his opponent. Secondly, the allegations and the proof must correspond and the relief given must be in accordance with both. Finally, defendants are entitled to know the theory on which their opponent relies, and if, after the case has been tried on the theory of fraud and the charges of fraud fully met and refuted as in this case, the court can grant relief because of facts alleged and proved merely as incidents to the fraud, defendants are wholly deprived of any opportunity to make a defense. By this change in theory facts which before were wholly irrelevant and immaterial become the ultimate facts of the case, and the defendants are unjustly prevented from having their day in court.

This is not a case where the plaintiff changed his theory in the course of the trial, as is allowed some times under Code practice where sufficient notice is given, but is a case where the whole theory of the action was changed in the decision of the Court, and these appellants had no opportunity whatever to meet the charges under the new theory. The general rule applicable to cases of this sort is thus stated in 16 Cyc. 485:

“And if plaintiff has framed his bill to adapt it to a certain theory on which he bases his right to recover,

the proofs must be such as to warrant a decree in conformity to this theory; and it is not enough that the proofs are sufficient to justify a decree in conformity to some other theory."

In the note to this section, it is said, p. 486:

"Where a bill in equity is framed on the theory that there was fraud entitling plaintiff to relief, it must be proved as laid in order to warrant a decree in plaintiff's favor; and the proof of other facts, although included in the charge of fraud, and sufficient under some circumstances to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed."

The basis of this rule is of course that relief can only be given in accordance with the facts alleged, and its strict application in cases of fraud is due to the adherence of courts of equity to the principle that the charge of fraud is one which should not be lightly made. This rule is abundantly sustained by the English authorities, by numerous cases in the Federal Courts, including at least one case in this Court, and in numerous state courts.

In the leading case of *Eyre v. Potter*, 15 How. 42, 56, 14 L. Ed. 592, the Court said (p. 598):

"It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited as directly in point, the case of *Price v. Berrington*, decided by Lord Chancellor Truro, in 1851. (*Vide* English Law and Equity Reports, Vol. VII, p. 254.)"

In the case of *Price v. Berrington*, 3 Mac. & G., 486, 42 Eng. Rep. 348, just referred to, the bill sought to set aside a conveyance for fraud, the facts relied on being that the grantor was insane at the time of the grant, that the grantee knew it and imposed upon him, that the agreed consideration was far below the value of the property, and only a portion of that consideration was paid. The insanity was proved, but none of the other facts alleged were proved. Lord Chancellor Truro dismissed the bill, although he was of the opinion that the insanity alone, if properly alleged, would have been sufficient ground for relief. His statement of the rule is adopted, word for word, by the Supreme Court of the United States in the quotation from *Eyre v. Potter*, *supra*.

In *Curson v. Belworthy*, 3 H. L. C. 742, 10 Eng. Rep. 294, a bill to set aside a conveyance charged fraud and imposition. The grantee was a poor, illiterate laborer who had come into a small inheritance and had been induced to sell it for an inadequate price. Proof of the fraud entirely failed, and it was held that the bill must be dismissed, although it might have been maintained on the ground that the conveyance was hastily and improvidently made if that ground only had been set up.

The most important English case, however, is *Wilde v. Gibson*, 1 H. L. C. 604, 9 Eng. Rep. 897. In this case the purchaser brought a bill for rescission of a contract of sale and cancellation of a conveyance on the ground that the vendor had fraudulently concealed the existence of a right of way over the property. The Vice Chancellor ordered the conveyance cancelled, although he found there was no fraud. On appeal to the House of Lords this decree was reversed. Lord Chancellor Cottenham said:

“It is in all cases important to consider how far the

case proved is in conformity with the case alleged; but it is peculiarly so in cases founded upon alleged fraud, imputing dishonest practices to defendants. It is in all such cases essential to prevent the proceedings from becoming instruments of unfounded slander. Plaintiff should bear in mind that imputations which cannot be supported will not only not profit them, but may debar them from that relief to which they might be entitled on other grounds if properly brought forward. * * * The result appears to me to be, first, that the plaintiff having rested his case in the bill upon imputations of direct personal misrepresentation and fraud cannot be permitted to support it on any other ground; secondly, that the evidence at most proves only constructive notice of the fact upon the non-communication of which the plaintiff founds his claim for setting aside his completed purchase; and that nothing short of positive knowledge can be sufficient for that purpose. The case alleged is not proved, and the case proved is not alleged; and, if it had been, is not sufficient to support the decree."

Lord Brougham said in reference to the above quotation:

"What my noble and learned friend has most justly observed is a principle of the highest importance to be kept in view in proceedings in equity—for the security of the court against imposition upon it—for the keeping straight and clear of the principles upon which its jurisdiction is to be exercised—for the safety of the characters of the parties—and for common justice."

Lord Campbell also concurred on the same ground. See also *Glascott v. Lang*, 2 Phill. (22 Eng. Chanc. Rep.) 310; *Ferraby v. Hobson*, 2 Phill. (22 Eng. Chanc. Rep.) 255; *Montesquieu v. Sandys*, 18 Ves. Jr. 313; *Powys v. Mansfield*, 6 Sim. 565.

These statements have been approved in numerous cases

in our state and Federal courts, and by leading text writers.

Beach, Modern Equity Practice, Sec. 99, says:

"No facts are properly in issue unless charged in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the court pronounces its decree *secundum allegata et probata*. A party can no more succeed upon a case proved but not alleged than upon a case alleged but not proved. Nor can any admissions in an answer, under any circumstances, lay the foundation for relief under any specific head of equity unless it be substantially set forth in the bill. 'It is an established doctrine of this court,' said Vice Chancellor Van Fleet, 'that where the bill sets up a case of actual fraud, and makes that the ground for the prayer for relief, the complainant is not in general entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated.'" (Hoyt vs. Hoyt, 27 N. J. Eq. 399).

In Doggett v. Simms, 79 Ga. 253, 4 S. E. 909, Bleckley, Chief Justice, stated the reason of the rule vigorously as follows:

"If a complainant cuts and slashes in the bill charging actual fraud, piling it up and up, without once suggesting constructive fraud, or a mere mistake as a ground for relief, why should the court charge anything on constructive fraud or bare mistake as entitling the complainant to a verdict? Must the court charge the jury on a theory of the case when the complainant has made no charge against the defendant based on that theory? If a transaction is so ambiguous as to bear three interpretations, such as actual

fraud, constructive fraud, and mistake, why should not all three be alleged, so as to apprise defendant that all are to be canvassed, and so as to apprise the court in due time that all are to be relied upon; and what is not less important, so as to let the record speak the truth and the whole truth when the verdict is returned and a decree rendered? Is a man to be branded ambiguously and absolutely with actual fraud by a decree, when he has only made a mistake or committed a fraud in law but none in fact? The sooner we forsake superlative and exaggerated pleading the better. And nothing will do more to correct the evil than for courts to adhere to the ancient and salutary rule that the *allegata* and *probata* must correspond."

Probably the most carefully considered case on this subject is *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510. Here a surviving partner had conveyed half of the firm property to defendant at a time when the firm was largely indebted, and had absconded with the money received. The complainant, as Receiver of the firm, filed his bill in behalf of the creditors to have the conveyance cancelled on the ground of actual fraud by the surviving partner and the grantee. Proof of the fraud wholly failed. The court then discussed the question in regard to relief on other grounds, saying, (67 Am. Dec. p. 518) :

"The question which then arises is, whether, dropping this charge, which veins and intermingles with the whole frame and texture of the bill, and rejecting it as surplusage, we shall be justified, by the rules of the jurisprudence which we here administer, if on the allegations of the bill we can find some inferior ground of relief than the actual fraud charged of giving relief on that ground under this bill. It is said by the counsel for the complainant that we may and ought, and he seems to argue as if, refusing to do so, we

should be guilty of sacrificing the inherent justice of the case to a mere rule of chancery pleading and practice. Now, grant that this be so, what right have we to dispense with rules established by wisdom for our guidance in the exercise of a jurisdiction which, considering the fallibility of human judgment, necessarily leave us quite latitude of discretion enough? Whilst, on the one hand, we know no system of jurisprudence more beneficial in its administration than that of the English chancery, governed, as it is, by fixed and certain rules and principles, and flexible only to circumstances in the modes of relief of which its forms render it capable, we know of none, considering its power of specific action, which would become so oppressive, if, flexible in principles and rules as well as in its modes of relief, it were so altered as to make the chancellor the tyrant, instead of the judge of the causes before him.

“Whilst the door of the court has always been left wide open to relieve those who suffer from acts or practices of fraud— a great head of its jurisdiction—it has always been most careful to require of those who apply to it on this ground to scrutinize their causes of complaint before they enter it, and to allege and thus give notice, on the one hand, of that which they intend to prove, and to prove, on the other, that which they have alleged as the ground of the relief applied for.”

After referring to the English cases with approval, the court said, p. 520:

“This rule, it will be noticed, does not suppose the bill to be defective in allegations to be met by proof establishing another ground of relief than that of actual fraud, but to be full in that respect; the difficulty being that these allegations are pointed with the others to such fraud, as the distinct ground of the relief which the bill invokes. Nor is the rule, as was remarked by

counsel in *Price v. Berrington*, 7 Eng. L. & Eq. 255, 'founded on any martinet principle of pleading.' On the contrary, Lord Cottenham, speaking of it in *Glascott v. Lang*, 2 Phill. 310, 'as a rule generally acted upon,' propounds it also 'as founded in justice,' 'because,' he continues, 'the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind of relief.' This we deem to be sound morality, and fit to be observed by those who sit in the gateway of the court of chancery to administer the high-toned justice of that court." (Our italics).

And on page 524 the Court says:

*"In almost all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground or not at all. * * ** There is more difficulty, therefore, in detecting the true ground or grounds upon which relief is sought in courts of equity than in the courts of law; but when detected, the result in the former is precisely the same as in the latter, as to charges of deceit or fraud. In either forum, if they are the ground of the action, they must be proved; or however good may be the case of the plaintiff if brought forward in another way, he must fail in the way in which he has chosen to put it." (Our italics.)

The Court accordingly dismissed the bill, but indicated its opinion that the defendant had purchased partnership

property with notice, and could be charged as a trustee of it in equity. It should be noted that in the above case the allegations, independently of fraud, would have supported a decree for plaintiff, while in the case at bar it is extremely doubtful if enough facts are alleged, outside of fraud, to entitle the complainant to relief.

This rule has been acted upon time and again by the Federal Courts and in a great variety of cases. Thus in *Dashiell v. Grosvenor*, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67, a bill to enjoin the alleged infringement of a patent, charged actual fraud and conspiracy. Fraud was not proved, but the Circuit Court granted the injunction on the ground of infringement. The bill was dismissed by the Circuit Court of Appeals because the complainant had failed to prove fraud, and was therefore not entitled to relief because of mere infringement. The Court said, (66 Fed. p. 339) :

‘The charges of fraud have been made either under an entire misconception of the facts or with a recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged.’

The Court then quotes with approval from *Price v. Ber-*

rington, and Tillinghast v. Champlin, *supra*, and cites a number of other cases.

In Rejall v. Greenhood, 35 C. C. A. 97, 92 Fed. 945, this Court held that a complainant could not change the theory of his pleading from a claim under an assignment which had been set aside by the state court, which claim was based wholly on fraud, to a claim to an interest in the surplus after the creditors who complained against the assignment had been satisfied.

In Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801, the bill sought to set aside a prior decree of the same court. The complainant alleged that in the original cause the answer was filed on June 29, 1885, that he agreed orally to a hearing on the bill and answer, that said answer was withdrawn without his knowledge or the knowledge of the court and another answer fraudulently interposed on July 21st, that the Court heard the cause on the bill and the second answer owing to the fraud and trickery of the defendant, and upon that hearing dismissed the bill. The decision of the circuit court was that although no fraud was shown, nevertheless the judgment had been obtained under a mistake of the court and all parties, and therefore should be set aside. On appeal, it was held that the question of mistake was not open on the pleadings and the decree must be reversed. The Court said, at page 806:

“Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764, says: ‘A decree has to be founded on the *allegata*, as well as *probata*, of the cause.’ This, as is well known, and for the best of reasons, is especially applicable to bills in equity charging fraud; and the rule is most strictly enforced under such circumstances. Daniell, Ch. Prac. (6th Am. Ed.) 382. A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof.”

In *Burk v. Johnson*, 76 C. C. A. 567, 146 Fed. 209, the Court said:

"The gravamen of the bill is the alleged false and fraudulent representations of defendant, and the decree must be sustained, if at all, upon proof of the specific and definite fraud alleged in the bill. 'The rule that the court will only grant such relief as the plaintiff is entitled to upon the case made by the bill is most strictly enforced in those cases where plaintiff relies upon fraud. Accordingly, it has been laid down that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any other ground.' Daniell's Ch. Pl. & Pr. vol. 1, page 380; *Eyre v. Potter*, 15 How, 41, 56, 14 L. Ed. 592; *Putnam v. Day*, 22 Wall. 60, 66, 22 L. Ed. 764; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 801. Attention is called to the foregoing rule because of a claim that the decree below might be supported on proof of a mutual mistake. We do not wish to be understood as intimating that the proof shows such a mistake, but the rule is alluded to for the purpose of sharply defining the issue before us. The questions arising on this appeal will be stated as the opinion progresses."

Here it was held that no fraud was established, and the Circuit Court was reversed. See also:

C. B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 593, 51 L. Ed. 638.

and cases cited *supra* under 'Points and Authorities.'

The rule is also sustained in numerous state courts, especially in those jurisdictions where the distinction between law and equity is still maintained. Thus, in *Mt. Vernon Bank v. Stone*, 2 R. I. 109, 57 Am. Dec. 709, the complainant alleged that his agent had fraudulently failed and re-

fused to account, but as he did not prove the fraud the court held that he could not claim an accounting because of the mere failure or refusal of the agent to account.

In *Nichols v. Rosenfeld*, 181 Mass. 525, 63 N. E. 1063, Chief Justice Holmes said:

“The cases come before us on frivolous bills of exceptions concerning which perhaps it would be enough to say that in this court the charge of fraud is regarded as something more serious than a rhetorical embellishment, that if a man puts his case on that ground he must maintain it or lose it, and that the plaintiffs on evidence made it abundantly clear that if there was any fraud it was not on the defendant’s side.”

See also cases cited *supra* under Points and Authorities.

The above authorities are absolutely controlling, and the facts of this case bring it precisely within the rule laid down. The whole frame and texture of the bill, from beginning to end, is fraud, and when the bill is compared with the decision of the lower court it is seen that proof of these allegations wholly failed.

After the formal and jurisdictional allegations of the bill, and a description of the “base lands,” it is alleged on information and belief (trans. p. 11) that during the month of August, 1900, John A. Benson, Joseph C. Campbell, appellants Cobban and Weirick, and certain promoting stockholders of the appellant Payette Lumber & Manufacturing Company, “*did wrongfully and unlawfully agree, and did conspire and confederate together by means of artifice and deceit to surrender said ‘base lands’ and to select other lands in lieu thereof, and to cheat and defraud complainant out of said ‘lieu lands’ when selected,*” and “*did conspire to cheat and defraud complainant out of the title,*

right of possession, and possession and proceeds thereof," and "converted the proceeds to their own use."

The Court said (trans. p. 496): "Neither Cobban nor his associates personally knew Benson, Campbell, Conklin or Reddy." and at page 499 states:

"Moreover, there is no substantial foundation for the charge, elaborated at great length in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains."

(Our italics.)

The balance of the complaint is replete with allegations of fraud and conspiracy. Thus, at page 14 of the transcript, the complainant alleges that she reposed trust and confidence in Campbell and Benson, but that neither of them at any time intended to carry out their promises; at page 15 she alleges that Campbell "wrongfully and fraudulently and in furtherance of said conspiracy" misrepresented the effect of the deeds sent to her for her signature; at page 17, that certain applications for selection of lieu lands and powers of attorney were signed by complainant, relying on Campbell's representations that they were deeds of certain "base lands" to Benson; and at the bottom of the page, that Benson and Campbell, knowing that complainant trusted them and would sign any papers Camp-

bell sent without question, *surreptitiously, and in furtherance of said conspiracy and scheme to defraud, inserted said powers of attorney among the deeds that Campbell sent to complainant for her signature;*" on pages 19 and 20, complainant alleges that certain representations made by Campbell were false and fraudulent, and in furtherance of the said conspiracy. It should be noted that the facts here alleged occurred long after the conveyance of the lands in question to Weirick. On page 34, complainant alleges that Cobban and Weirick were mere dummies and tools of Benson and Turrish and the promoting stockholders of the Payette Lumber & Manufacturing Company; at page 36 it is said, "that said alleged powers of attorney and alleged conveyance to Weirick, Trustee, are invalid and fraudulent and forged, and constitute a cloud upon complainant's title to said lieu lands." In the prayer at page 37, appellee prays "that the alleged power of attorney be declared false and forged, and said alleged deed to Weirick, Trustee, be cancelled and annulled."

It is thus seen that the charges of fraud and conspiracy are so interwoven with the whole texture of the bill as to be almost inseparable from any other allegations.

The answer of the trial court to all these allegations has been quoted above. The court expressly found that there was no fraud in the original agreement between Mrs. Conklin, the Reddys and Benson, but only a misapprehension on the part of Mrs. Conklin as to the exact means of carrying out the exchange. The court does hold that Benson did not subsequently perform that agreement and that his subsequent conduct did not "harmonize with the ordinary standard of honesty and fair dealing," (p. 504). This was based on his letter of Dec. 11, 1901, quoted in the opinion (Tr. p. 504, 505) which showed that all the applications were being held up in the Department and from which it may per-

haps be implied that no money had yet been received from the prospective purchasers of the lieu lands; but this was months after Cobban had bought and paid for the scrip, and had selected the lands in question. So this subsequent conduct on the part of Benson even if susceptible of the construction placed on it by the Court could not possibly taint the prior transaction.

The Court said (Tr. p. 517) :

“It is to be added, that, while as has already been said, the defendants are guilty of no moral wrong, and are wholly exonerated from the charges of fraud preferred in plaintiff’s bill, it is doubted whether, in purchasing the scrip, they exercised that measure of care required of those who would claim the protection of the maxim which they invoke.”

The evidence showed that appellant Cobban exercised ordinary care in regard to the purchase of this scrip, and certainly a failure to exercise extreme care is no ground on which complainant can rely for relief in equity.

The decision was not, however, based on any misrepresentations by Benson nor on any breach of duty by Campbell, because neither of these persons were parties to the action, and no privity was shown between them and appellants. The trial court thus completely exonerated appellants from the charge of fraud, and cancelled the conveyances on the ground that the original conveyances to Weirick, Trustee, were made under powers of attorney, delivered by appellee’s agent in violation of instructions, not known to appellants.

This change in the theory of the case was made after the evidence was introduced, after the briefs had been submitted and after the argument had been made, and appellants had absolutely no opportunity to attack the new the-

ory. Mistake as a ground for relief was neither alleged nor proved, and the only possible equitable ground for relief upon the facts and law, as stated by the Court, is that of cancelling a cloud on title. But it is conclusively settled in the Federal Courts that a bill to cancel a cloud on title can only be maintained where the plaintiff is in possession, or the land is vacant and unoccupied. See:

Whitehead v. Shattuck, 138 U. S. 146, 34 L. Ed. 873.

Lawson v. U. S. Min. Co., 207 U. S. 1, 52 L. Ed. 65.

Whitehouse v. Jones (W. Va.) 12 L. R. A. (N. S.) 76, note.

Stockton v. O. S. L. R. Co., 170 Fed. 626.

Appellee had alleged in her bill that the land was vacant and unoccupied and not in the possession of appellant, The Payette Lumber & Manufacturing Company (Trans. pp. 3, 4). The appellant Company, however, denied these allegations and affirmatively alleged its own possession (Trans. pp. 42, 54). As long as the theory of the case was fraud the question of possession was doubtlessly immaterial, but when the Court by its decision made the theory of the case that of removing a cloud on title, possession became one of the material and ultimate facts. Appellee had given no evidence on this point and appellants had no opportunity to show their own possession. But the Court assumed appellants were in possession for it says in its opinion that they have undoubtedly incurred expenses aggregating considerable amounts "in caring for the timber growing thereon, and in paying taxes and other charges." (Tr. 518.)

This change in theory was therefore absolutely prejudicial to them, for they had tried the case on the issues raised by the pleadings. The rule established by the authori-

ties above cited is therefore peculiarly applicable to this case. The charges of fraud are the gravamen of the complaint, the court's decision wholly negatives fraud and entirely changes the theory of the case, and relief should not have been given on any inferior ground of equity jurisdiction, even if such inferior ground had been alleged and proved.

Appellant Cobban Had Implied Authority to Insert His Own Name in the Blank Powers of Attorney and to Convey to Weirick as Attorney in Fact of Appellee.

Aside from the questions of pleading and practice it is submitted that the trial court erred in its conclusions of law (trans. pp. 509-517). In the first place it held that the conveyances from Cobban to Weirick were without authority, especially in view of the fact that the powers of attorney as sent to Cobban were in blank as to the name of the attorney in fact, and Cobban inserted his own name therein. This holding is predicated on a misconception of the decision in *Allen v. Withrow*, 110 U. S. 119, 28 L. Ed. 90-94. That was a case of an express oral authority to Allen to fill in the name of his wife as grantee. He had delivered the deed with the name of the grantee still in blank, and the blank had never been filled out. The observation quoted from Mr. Justice Field can have no bearing on the question here involved, which is, whether an authority in appellant Cobban to fill the blanks in the powers of attorney can be implied from the circumstances.

The feature in the case at bar which the court relied upon to distinguish it from the case of *Conklin v. Benson*, (Cal.) 116 Pac. 34, was that Cobban himself filled the blanks in the powers of attorney. Appellant's contention is that he had implied authority to do so, and that the existence of the

blanks was no notice of any defect in the agency, or of any secret understanding as to payment being a condition precedent to such authority. Here the seller had no interest in the acts of the agent, and it was wholly immaterial to the seller whether the agent was honest, competent or otherwise, for Cobban purchased the scrip, or right of selection, and not the land after it was selected.

The strict rule that a deed or power of attorney executed with the name of the grantee or attorney in blank is invalid unless filled out in pursuance of an authority in writing, has been repudiated in almost every American jurisdiction. It rests on the ancient theory of the peculiar sanctity of sealed instruments, which has been done away with in Idaho by Section 3319 of the Revised Codes, which reads as follows:

“All distinctions between sealed and unsealed instruments are abolished.”

Such a provision is found in a majority of our state jurisdictions. In the case of *Drury v. Foster*, 69 U. S. 24, 17 L. Ed. 780, it was said:

“We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted, although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument. The better opinion at this day is that the power is sufficient.”

In 2 Cyc. 159, 160 it is said:

“It may be laid down generally that if one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered

to be filled up properly, according to the agreement between the parties, and when so filled the instrument is as good as if originally executed in complete form; and if one sign or indorse a note or bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original agreement. As has been pointed out, however, this is a question of authority, and not of alteration of a completed instrument.

"If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same; and as between such party and innocent third persons the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody. Even if the note is not a negotiable one, still the rule above stated is held to be the same as to the liability of the person signing the blank, if it is a contract for the payment of money, for the leaving of a blank raises the implied authority to treat the person with whom the paper was intrusted as an agent authorized to fill the blank. So the doctrine applies, whether the paper is discounted or is delivered in payment of an existing debt.

In like manner any *bona fide* holder into whose hands the instrument passes has authority to fill blanks to perfect the instrument." (Our italics).

And at page 162 it is said:

"One who signs a blank piece of paper cannot be bound without showing an authority to fill it, unless some principle of estoppel can be applied, and as between the signer and the party to whom the instrument is intrusted, or as between the former and a subsequent purchaser with notice of limitations upon the authority of the person to whom the instrument is intrusted, the signer cannot be bound by the filling of unauthorized

blanks or the excessive exercise of authority in filling blanks intentionally left to be filled. *But it does not matter that the party taking such instrument has knowledge of the mere fact that it was executed in blank, so long as there is nothing to put him on notice that the authority thereby conferred is restricted or has been violated.*" (Our italics).

These quotations are fully borne out by numerous cases cited in the notes.

The question of filling blanks in instruments after execution is fully treated in 3 Enc. L. & P., 428-448. At page 430 it is said:

"The strict rule of the English Courts has been applied in a number of the states of the Union."

Cases are then cited from several jurisdictions showing that in most instances the earlier cases supporting the English rule have been overruled or modified. At pages 431-432, the same author states:

"But the courts of other states of the Union have taken the view that the principle that an authority to make a deed or execute a sealed instrument for another must be under seal should be limited to the execution of a sealed instrument by one person for another; and it is considered that the mere completion of an imperfect sealed instrument by the filling of blanks left therein does not come within the inhibition of the rule that authority to make a sealed instrument must be under seal. In line with this view, cases are found which have sustained the sufficiency of parol authority to fill blanks in sealed instruments such as deeds, bonds, mortgages, and powers of attorney under seal."

At page 433 it is said:

"It may be stated as a general rule, which is unquestionably applicable to all simple contracts in writing,

and, according to some authorities, also to specialties, that where a person, intending to enter into a contract, delivers to another a writing containing blanks, evidently meant to be filled, this creates in the receiver of such instrument, and, at least in the case of negotiable papers, in his transferees, an implied authority to complete the instrument by filling the blanks in the way apparently contemplated by the maker, with matter in general conformity to the character of the writing, provided it be done within a reasonable time."

To support the latter statement cases are cited from Alabama, Colorado, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Missouri, New York, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and Wisconsin. At page 435 it is said:

"Where the view obtains that authority to fill blanks in sealed instruments can be conferred only by an instrument under seal, there can, of course, be no implied authority to fill such blanks.

"But in jurisdictions holding that blanks in specialties may be filled in pursuance of parol authority, such authority need not be expressly given, but may be implied from the circumstances of the case." (Our italics).

Many of the cases have involved negotiable instruments, but as the rule is based on principles of agency the precise nature of the instruments, whether it be a note, deed, bond, mortgage, or power of attorney, is wholly immaterial.

In 3 Enc. L. & P., 440-442, the author speaks as follows in reference to the filling of blanks in violation of the authority given:

"It is a well-settled principle, applicable to both negotiable and non-negotiable contracts, that, where a person, with intent to execute a contract, delivers to another an incomplete instrument, and such other has

authority, either expressly given or implied by law, to complete the instrument, such instrument is enforceable in the hands of a purchaser for value and without notice, notwithstanding the blanks have been filled up in a manner violative of the authority conferred.

“This doctrine is based on principles of agency. The filling of such blanks in a wrongful manner by a person having express or implied authority to fill them in another way is deemed to be a breach of confidence merely, and is held to be within the scope of the principle that, where one of two innocent persons must suffer through the wrongful act of a third person, the loss must fall on that one who reposed confidence in such third person and thereby enabled him to perpetrate the wrong.”

Of the numerous authorities cited in support of the above propositions we only wish to refer to a few of the more important ones. The case of *Bridgeport Bank v. New York etc. R. Co.*, 30 Conn. 231-274, involved the question of a parol authority to fill a blank in a power of attorney under seal. The court said:

“Nor can any reason be assigned which is founded in good sense and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties and nothing but an extreme technical view derived from the ancient law of England can justify the making of any distinction between them.”

In *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317, the question of an implied authority to fill blanks in a power of attorney to transfer a stock certificate was involved, and there, as here, evidence of commercial usage

had been given to show that this was customary. The court said (34 Am. Dec. 325) :

“The power of attorney to transfer, etc., was made in blank by the owner placing his name and seal with the subscription of a witness upon the back of the certificate, which was sent for the purpose of having a power written above the name and seal, to any person who might advance money on its security, to whomsoever he might direct: was that power valid when thus written? This objection, like the last, would have been more formidable in England a century or two ago, than it is now in this country. Evidence was given that this was the customary mode for years of transferring stock in our great stock market of New York, as well as elsewhere. Such a custom certainly could not vary the settled law, if that pronounced a deed or other sealed instrument to be void when written and executed in this manner; but the evidence of custom is good not to contradict or change the law, but to explain the meaning and intent of parties in contracts: as here, to show Barker’s understanding and design in regard to the authority he gave. Judge Edwards, at the trial, stated its effect with precision. He said that ‘the testimony was legal proof not to vary the law, but to show Barker’s intention in thus executing an instrument in blank.’ ”

And at page 326 the Court states :

“Now the writing of a whole power to transfer, with verbal or implied authority to do so, above a seal and signature on the back of a stock certificate, where nothing else could with any propriety be possibly written, is a far smaller excuse for delegated authority, than where the name of a party is inserted, or still more the sum for which he is to become bound. There the responsibility that the agent may impose upon his principals is unlimited. Here it is confined to the hundred shares of stock, with the latitude of inserting one

name or another as the vendee, pledgee, or the attorney."

In the case of *Eagleton v. Gutheridge*, 11 M. & W. 466, notwithstanding the strictness of the English courts as to filling blanks after execution, it was held that the filling in of a blank in a sealed power of attorney sent from a foreign country did not invalidate it because the authority to fill the blank was implied. Two other cases involving blanks in powers of attorney and holding the same rule, are *Markham v. Comaston*, Moore (K. B.) 547, and *Vliet v. Camp*, 13 Wis. 198.

But there can be no difference between an implied authority to fill a blank in a power of attorney and an implied authority to fill a blank in a deed, bond, or other instrument in writing. A leading case in this country on the general subject is *Inhabitants of So. Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535. The Court said (87 Am. Dec. 536, 538, 539, 542) :

"It seems to be now well settled that where a party executes a deed or bond or other instrument, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. *This authority may be by parol. It may be implied from the facts proved when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given.* The law on this subject has recently been stated by the supreme court of the United States in *Drury v. Foster*, 2 Wall. 24. * * *

"The law on this subject in Massachusetts, before the separation, is stated by Chief Justice Parsons in *Smith v. Crooker*, 5 Mass. 538. That was a case on a collector's bond, in which, after the surety had signed,

a blank had been filled. The judge after stating the general principle, that it would not be an alteration which would avoid the bond, to fill up blank spaces left, if the party executing the bond agrees that it may be afterwards filled up, says: 'And the party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond.' This decision is cited and accepted by the counsel on both sides as the rule to be applied to the case at bar.

"It was adopted by the presiding judge, but he ruled that the filling of the blank space left for the insertion of the penal sum did not come within the rule. The correctness of that ruling is the question now presented by the exceptions.

*"It is evident that the implied authority is limited, but it clearly may extend beyond mere matters of form, or the mere insertion of words, which the law itself would supply. It may, as it has been shown, extend to those matters which are required to make it a binding and perfect instrument. * * **

"The rule invoked is purely technical. Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz.: that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." (Our italics).

In *Burk v. Johnson*, 76 C. C. A. 567, 146 Fed. 209, the Circuit Court of Appeals for the Eighth Circuit said:

"The deed executed, acknowledged, and deposited in escrow by Johnson and his wife was for the convenience and at the request of Burk executed in blank, the name of the grantee being omitted, with the agreement made at the time that Burk might thereafter direct what name should be inserted. Presumptively, as the consideration for the assignment of the copyright was payable to Burk, he had a right to fill in his own name. He substantially did so, and caused the deed, with the blank so filled, to be duly recorded in the proper recorder's office. Did this avoid the deed? We think not. It carried out the undoubted intention of the parties, and executed the contract as actually made. A deed to real estate situated in the state of Kansas need not be executed under the seal of the grantors (Section 1195, Gen. St. 1901), and accordingly the deed in question was not so executed. In such circumstances, whatever may be the rule in cases where the deed must be a specialty, parol authority, express or implied, to fill in a grantee's name after execution by the grantors is sufficient, and when done the deed is good. Mechem on Agency, Sec. 94, and cases cited; Am. and Eng. Ency. of Law, vol. 1, p. 955, and cases cited. Even if the conveyance is by law required to be under seal of the grantor, there is abundant authority and reason for holding that a blank left for the name of grantee may be filled in by the grantee after execution." (Citing cases).

In *Van Etta v. Evanson*, 28 Wis. 33, 9 Am. Rep. 486, it was said:

"The only question of law in the case is as to the authority of Hegg thus to fill the blanks. It does not appear that the defendant directly or expressly authorized Hegg to insert the name of the plaintiff or of any particular person; and his authority to do so, if it existed, is to be implied from the facts and circumstances of the execution and delivery of the papers. It

is insisted that no such authority can be implied, or expressly given by parol, to write or insert anything in a sealed instrument after delivery, and that a re-delivery is necessary to give it any validity. Authorities to this effect, and we believe all that are to be found, are cited. On the other hand cases holding the opposite doctrine are cited. The latter are considerably the most numerous, and among them is a case in this court. *Vliet v. Camp*, 13 Wis. 198. This last really controls the present case, unless it is to be overruled; and we certainly see no occasion for that. The grounds upon which the opposite decisions proceed are well stated by Chief Justice Marshall in *The United States v. Nelson & Myers*, 2 Brock, 64. *They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away.*" (Our italics).

In *Friend v. Ward & Yahr*, 126 Wis. 291, 1 L. R. A. (N. S.) 891, the same court said:

"But the general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied."

In *State v. Young*, 23 Minn 551, it was said:

"We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way by which it might be given in a sealed instrument. (Citing cases). * * * There is no claim that express authority was given, but this is not necessary. Such authority may be implied from the circumstances. It may be implied from the facts proved, when these facts all taken together and fairly considered justify the inference."

In the case of *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, an official bond was executed by the obligor and some of the sureties, with the name and term of the office, the date, the penal sum and the names of other sureties in blank, and was left in the custody of the obligor. This was done with the understanding that the sum to be inserted should not exceed \$250,000. The blanks were filled with the knowledge of the obligor, and a larger sum than \$250,000 was inserted. It was held that the bond was valid and that, assuming the obligee knew of the existence of the blanks, there was no notice of the secret agreement. The court said, (35 Am. Rep. 189, 191) :

“The position taken is, that any material defect whatever apparent upon the face of the bond is sufficient to give notice of the actual facts respecting the condition of the execution of the bond. There were several defects here apparent upon the face of the bond, but no one of them, that we can see, should affect the obligee with notice that it was the understanding of the sureties that the penalty of the bond was not to be more than \$250,000, or put them upon inquiry on the subject to ascertain whether it was not to be any larger than that. Surely, the lack of a date in the bond would not do so; nor the absence of the names of the sureties in the body of the bond; nor the omission of the name of the office; and no more so, as we conceive, did the blank in the bond for the penal sum. This could not excite suspicion of there having been a limitation of the amount of the penalty. One could reasonably be led to infer no more from it, than that as by the law the amount of the penalty was to be fixed by the common council, the penal sum had been left blank to be filled in when the common council should have determined what the amount of the penalty should be. *Under the decisions, the principal obligor had an apparent implied authority to fill up the blank, and the blank was filled by his direction.*

*"The obligee was justified in assuming, and acting upon the assumption, that Gage really possessed the authority with which he was apparently clothed. Knowledge of the unfilled blank for the penalty was but knowledge of the implied authority to fill it; and consequently could be no ground of suspicion of the lack of authority. The imperfection upon the face of the bond which is to have the effect of the notice contended for, must, as we regard, be of such character, that it points toward, indicates, and excites suspicion of the particular matter of defense alleged against the instrument, and as an ordinarily prudent man, to put the obligee to make inquiry as to the existence of the very thing which is set up in defeat of the instrument—as in this case, the condition of the limitation of the penalty to \$250,000. * * **

"The bond signed and sealed by the sureties was presented by Gage to the common council as his required official bond. The common council were not to suppose that the sureties had done a mere idle thing, or that they were dealing deceitfully with the council in tendering this bond for their acceptance, and having in reserve a secret understanding which should nullify the bond. But they had the right to think the sureties meant honestly, and intended that the instrument they had signed should be accepted as, and serve for, the official bond of Gage. And although there were the unfilled blanks in the instrument, they saw that Gage had implied authority to fill them in such appropriate manner as might be necessary to make it such that it would be accepted by the common council as Gage's official bond as city treasurer, as they were so informed by decisions of the highest courts in the land. Of course then the blanks in the bond were no indication of the want of authority, and could not put the obligee upon inquiry as to its existence."
(Our italics).

The case last cited effectually disposes of the suggestion

of the trial court that the mere existence of the blanks in the powers of attorney were notice to appellant Cobban of a defect in the authority and the alleged agreement that payment should precede delivery of the title papers. The secret understanding between appellee and Campbell and Benson, in the case at bar, corresponds to the secret understanding in the Illinois case, that the penal sum should not exceed \$250,000. In neither case was there anything to put the other party on notice as to the existence of the secret agreement.

In *Clemmons v. McGeer*, (Wash.) 115 Pac. 1081, the Court said:

“Appellants executed the deed with the name of the grantee left blank. In this condition it was delivered into the hands of Bell by appellants, upon his promise to produce the receipts showing payment for material furnished and work upon the building to the extent of the value of the land. Bell then inserted the name of respondent in the deed as grantee and delivered it to him for value; whether as a mortgage to secure a loan or an absolute conveyance we need not now determine. There is no allegation of any knowledge on the part of respondent as to the manner in which Bell acquired possession of the deed, nor of fraud of any nature on the part of respondent indicating that he was other than an innocent purchaser or mortgagee of the land. The possession of the deed by Bell was such *prima facie* evidence of its delivery as we think entitled respondent to assume that it had been delivered to Bell for the purpose of conveying title to the land. *Richmond v. Morford*, 4 Wash. 337, 341, 30 Pac. 241, 31 Pac. 513. Now had Bell's name been inserted in the deed at the time it was executed by appellants, and had Bell then conveyed by deed of his own to respondent, clearly respondent would have acquired an interest in the land as an innocent purchaser or mortgagee. It seems to be well settled that a deed

in which the name of a grantee is left blank and otherwise lawfully executed will vest title in a person whose name is subsequently inserted therein by one having authority from the grantor to do so. *In this case we think the authority of Bell to insert respondent's name in the deed as grantee must be determined from the view that the respondent was entitled to take of Bell's authority from the fact of Bell's possession of the deed.* The Supreme Court of Iowa in the case of *Hall v. Kary*, 133 Iowa, 465, at page 468, 110 N. W. 930, at page 931 (119 Am. St. Rep. 639), dealing with the question of this presumption of authority of one in possession of a deed with a blank for the insertion of the name of a grantee, said: 'It appears beyond controversy that plaintiff left the instrument which had been thus executed by him and his wife with Chamberlain, and accepted and retained possession of a conveyance of property in exchange for that in question; and it must be presumed that, although plaintiff's deed was blank as to grantee, the intention was to vest Chamberlain with title to the property described therein, and authorize him to insert the name of a grantee as he should see fit. That a deed thus left blank as to the grantee, being otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this state.' " (Citing cases). (Our italics).

Other cases on implied authority to fill blanks in deeds, bonds, powers of attorney, and similar instruments are cited *supra* under "Points and Authorities." The same rule is established by a multitude of cases in reference to negotiable instruments, and as it is rested on principles of agency those cases are equally applicable here.

In *Cox v. Alexander*, 30 Ore. 438, 46 Pac. 794, the Court said:

"But, where a promissory note is issued with a blank

for the payee's name, a bona fide holder thereof may, within a reasonable time, fill the blank by inserting his name therein, and thus give certainty to one of the essential requisites of such instruments. *Thompson v. Rathbun*, 18 Or. 202, 22 Pac. 837. The authority of the holder of a promissory note to supply the omissions therein, and insert his name as payee thereof, rests upon the doctrine of agency. The maker of a note, by omitting to name the payee therein, impliedly invites a bona fide holder thereof to supply the omission and give certainty to the contract; and this implied power renders a bona fide holder the agent of the maker, and confers upon such agent authority to supply any omissions in the instrument that are not inconsistent with the terms of the contract."

See also, *Angle v. Insurance Co.*, 92 U. S. 330, 23 L. Ed. 566, and cases cited *supra* under "Points and Authorities."

Numerous cases involving parol authority to fill blanks in deeds and similar instruments have also been cited *supra* under "Points and Authorities" and it is submitted that these cases are strictly analogous to the case at bar.

Under the cases above cited, it is clear that authority to fill blanks in powers of attorney may be implied from the fact of their being in the possession and control of some person other than the principal, that this authority may rest to some extent on custom and usage, and that the existence of such blanks does not put one who gives value for the instrument upon inquiry as to the precise extent of the authority or secret limitations upon it.

In the case at bar appellee certainly intended to give some one authority to fill these blanks. The papers were fully executed and acknowledged, except for the blanks, and as soon as Benson paid the \$3.80 per acre into the Anglo-California Bank, (if the evidence be held to show that an escrow was contemplated), he was entitled to absolute con-

trol of them. Upon such payment he would have been clearly authorized to fill out the blanks himself, or to allow some other person to do so, because appellee would have lost all interest in the matter. His actual authority was therefore to fill out the blanks on payment, but it was the *apparent authority* upon which appellants Cobban and Weirick were entitled to rely, and there was no notice of any secret limitation that payment was a condition precedent to the apparent authority becoming effectual. Appellee had clothed Benson with the indicia of authority as to these papers. Either through her carelessness or that of her agent Campbell, she had given him full control over the powers of attorney and other papers, and the only limitation was the secret one in regard to payment. It requires no citation of authority to show that a third person is entitled to rely upon the apparent authority given an agent by his principal, and this is clearly so where the third person has paid money on the strength of an authority inferred from the possession of the principal's property by the agent.

Benson was an established dealer in scrip. He quoted Cobban a price of \$4.00 per acre, which was the then going market price. Cobban ordered the scrip by mail or wire, as needed in the usual course of business, paying for the same at the banks in Boise or Butte as the case might be, to which the scrip was sent by Benson for delivery upon payment by Cobban of draft attached (Tr. 259-260). When Mr. Cobban paid for the scrip he received the usual papers executed in the usual manner with the name of the attorney in fact and the land to be selected in blank, which was customary in the scrip business, and was in fact the only practical way of marketing scrip.

When Cobban paid the draft attached to the papers the scrip or selection rights became his property, and he and not the seller or former owner of the base lands, was there-

after the sole person interested in the selections that would be made and the prices and terms upon which the lieu lands should be sold. The purchase by Cobban was really not a purchase of the lands to be selected, but a purchase of the *right* of selection—a right which had accrued under the Act of Congress of June 4, 1897, authorizing lieu land selections upon the conveyance by appellee to the Government of the base lands. This conveyance had been made several months, or a year prior to the purchase of the scrip by Cobban, and the abstracts of title to the base land which accompanied the scrip and were a part of the papers purchased, showed: (1) a deed to the base lands from appellee, duly recorded in the county recorder's office of the proper county in the state of California, conveying the same to the Government, and (2) that the title stood in the Government, free and clear of any and all encumbrances. Such conveyance to the Government gave appellee the right to select lieu lands, and it was this right that Cobban purchased. The exercise of the right or the making of the selection in the name of appellee was merely a fiction in order to comply with the regulations of the Land Department. It was a case where the principal had no beneficial interest in the selection or in the agency. The agent, Cobban in this case, was in fact the principal, but in order to receive any benefit from the right which he had purchased and paid for he was required to make the selection nominally as agent or attorney in fact for appellee, when in truth and in fact appellee had no interest whatsoever in the selection. It is of no importance therefore that appellee did not know Cobban. It was wholly immaterial to her whether he was white or black, competent or incompetent, for the special right or agency which he was exercising in her name he had purchased and paid for and it was his property and not hers. It was for Cobban to determine, after he had paid for the scrip who should be the

agent to make the selection, and who should fix the price and terms for which the property selected should be sold.

That there was implied authority at least to fill in the blanks cannot be denied, otherwise the scrip purchased would have been of no value. And the law will presume that the seller upon receiving the money for the scrip intended that the purchaser could insert the name of the agent, for without such authority the scrip was valueless. The trial court failed to note the vast distinction between the rule which controls the filling in of blanks in instruments such as we have in this case and the rule which has by some courts been applied where the name of a grantee has been inserted in a deed without authority from the grantor. When the true relation between the attorney in fact and the nominal principal in a scrip selection, (where the attorney in fact has purchased and paid for the scrip), is clearly understood no authority can be found supporting the proposition that the insertion of the name of the agent without the knowledge of the nominal principal invalidates the document.

In this case appellee occupies the inconsistent position of ratifying the agency in part. She ratifies the selection of the land and the insertion of the name of the agent and description of the land in the powers of attorney used as the basis for the selection, but repudiates that part of the transaction which authorized the agent to convey.

The act of an agent cannot be ratified in part and disaffirmed in part. The ratification is *in toto* for the law will not allow a principal to claim that which benefits him and repudiate the rest.

Rader v. Maddox, 150 U. S. 128, 37 L. Ed. 1025.

Egbert v. Sun Co., 126 Fed. 568.

Sutherland v. Ill. Cent. R. Co., 81 C. C. A. 620, 152 Fed. 694.

Clark & Skyles, on Agency, Sec. 108.

2 Enc. L. & P. 862, and numerous cases cited in the notes.

*Appellant, The Payette Lumber & Manufacturing Company
Purchased for Value and Without Notice, and Took the
Legal Title Wholly Discharged From the Claims and
Equities of Appellee.*

Appellant, The Payette Lumber & Manufacturing Company, claims title to the lands in question on the ground that it had purchased them at \$8.55 $\frac{1}{4}$ per acre in entire good faith, without notice, actual or constructive, of any defect in the title or of any equities of appellee, and in reliance upon the perfect record title of appellant Weirick as Trustee. The consequences of such a bona fide purchase are well illustrated by the case of Guthrie v. Field (Kan.), 116 Pac. 217, the facts of which closely resemble those of the case at bar. There Guthrie brought suit to quiet title on the following state of facts: He had delivered to one Field a warranty deed, executed and acknowledged, but with a blank for the name of the grantee. Field was to find a purchaser within thirty days and on collecting \$2,000 for Guthrie was to fill in the name of the buyer and give him the deed. After the thirty days a stranger brought the deed to Guthrie with the grantee's name still in blank, and Guthrie declined to fill it. A day or two later the deed was filed for record, containing the name of the Osage Livestock Company as grantee, and later one Riffie purchased for value and without actual notice from the Company. The trial court found that the Osage Company had actual notice of the violation of authority, and plaintiff contended on the appeal that, as the authority had not been pursued, the deed was void and conveyed no title. In answer to the contention that only Field could fill in the blank, the Court said:

"The modern and, as we think, the better rule is that authority may be given by parol to insert the name of a grantee in a deed, even after delivery, and such authority may be implied from the circumstances. 2 Cyc. 159-160, 168-172; 3 Cyc. L. & P. 431-435. We do not regard it as material by whose hand the blank is filled. If Field had complied with his instructions in all other respects—if he had collected the \$2,000 and remitted it to Guthrie—the fact that a representative of the Osage Live Stock Company, instead of Field, wrote in the name of the corporation, after the expiration of the 30 days, would hardly be deemed a sufficient ground to avoid the deed."

In discussing the rights of Riffie the Court said:

"It follows that under the evidence and findings the deed did not pass title; that as between Guthrie and the Osage Company it could have been set aside. Riffie, however, stands upon a different footing. Either he or Guthrie must suffer by the wrongful act of Field. Riffie has been diligent throughout. His conduct has been that of the ordinary business man. He had no reason to suspect any irregularity and no means of ascertaining the real facts except by making an unusual investigation for which there was no apparent occasion. Guthrie on the other hand, by intrusting Field with the blank deed, gave him the power to make a perfect record title in any one he might choose. Guthrie intended that Field should fill in and deliver the deed, but only upon certain conditions. Guthrie reposed confidence in Field that he would act in accordance with his instructions, knowing that, if he did not, some innocent person might be misled. Field delivered the deed contrary to his instructions, and the consequence followed that might have been anticipated if he were to prove unfaithful—a stranger to the transaction parted with his money having every reason to suppose he was obtaining a good title. Under these circumstances, the loss must fall upon Guthrie rather than upon Riffie."

Then, after quoting with approval from 3 Enc. L. & P. 440-442, 445, the Court said:

“An obvious distinction is to be noted between depositing a completed deed to be delivered upon conditions, and intrusting to another a paper which at his will may be converted into an instrument, attested as genuine by the real signature and acknowledgment of the grantor, purporting to convey the property to any one the holder may select. One who arms another with such an uncontrollable power must know that, if his chosen agent shall prove dishonest, that it is likely to happen which in fact happened here, and, if such result follows, it must be regarded as the consequence of his own imprudence. In acknowledging a blank conveyance before an officer, a grantor in effect declares it to be a deed, which it is not, so long as its terms are incomplete. Having purposely put forth his solemn declaration that he has signed the instrument as a complete deed, when he has not in fact done so (expecting the custodian to find a purchaser, fill in the blank, and effect a transfer of title), he is answerable for the consequences if another innocently suffers loss through relying upon such assurance, and he cannot avail himself of the plea that a blank deed is no deed.”

This decision it is submitted is sound in theory and conclusive of the case at bar, which is, if anything, a stronger case for the innocent purchaser. Here appellants Cobban and Weirick gave full value for the right to select the lieu lands, and they certainly had no actual notice of any agreement between appellee and Benson limiting their authority in any way, and as shown above they could not properly be charged with constructive notice.

Appellant Company purchased in reliance on a perfect record title, without notice, actual or constructive, of any claims or equities of appellee, and it is submitted took the

title absolutely discharged from any such claims or equities.

It may be contended, however, that appellant, The Payette Lumber & Manufacturing Company, had constructive notice of the rights of appellee, and some of the observations of the trial court seem to indicate such an opinion. Thus, in declining to hold appellee barred by laches or estoppel, the court mentions the fact that the revocation of powers of attorney was executed by appellee January 3, 1903, and recorded in Boise County, Idaho, January 16, 1903, some five months before the conveyance from appellant Weirick to appellant Payette Lumber & Manufacturing Company (complainant's Ex. "T", tr. p. 503). This instrument reads in part as follows:

"KNOW ALL MEN BY THESE PRESENTS, That I, Mollie Conklin, a widow of the City and County of San Francisco, State of California, do hereby wholly revoke, cancel and annul, any, all and every Power of Attorney, and any Authority of Agency of every description, of any kind or any nature, executed by me, or claimed to have been executed by me, and all that show, or claim to be irrevocable on their face, are cancelled and annulled *and denounced as fraudulent, particularly one given or in name of C. L. Hovey.*" (Our italics.)

It should be noted in the first place that this instrument describes appellee as a resident of San Francisco, while the powers of attorney describe her as a resident of Bakersfield, California (tr. p. 469). This variance alone should be sufficient to release an innocent purchaser under a power of attorney from Mollie Conklin of Bakersfield to R. M. Cobban, from the implication of constructive notice. But these powers of attorney were merely to convey certain parcels of land, and when that land had been conveyed by appellant

Cobban to appellant Weirick, as charged in appellee's bill and admitted by the answers, these instruments were wholly spent,—the agency was terminated by its own limitation, and this attempted revocation was both ineffectual and impossible. And as held in *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33:

“The revocation of an authority after it has been executed cannot avail to annul the contract made in conformity thereto.”

The only possible effect that this instrument could have if it had been brought to the actual notice of the appellant Company would have been to put it on inquiry to ascertain why the powers of attorney were “denounced as fraudulent;” but it is conceded that appellant Company never saw the instrument, so there is no question of actual notice. Constructive notice can certainly be no more extensive than actual notice would have been, and this instrument could not possibly be constructive notice of any defects in the title of appellant Weirick. Its operation was necessarily prospective. It failed to specify any person whose agency was revoked, except C. L. Hovey, although appellee and her attorney, Mr. N. E. Conklin, actually knew of Cobban's agency and the selection of lands in Boise County by him, and had at least constructive knowledge of the powers of attorney to convey, which had been recorded by him in that county. It was recorded long after the powers had been exercised, it was wholly outside of appellant's chain of title, and it alleged a fraud which four courts of record have emphatically found did not exist. See:

Conklin v. Benson, (Cal) 116 Pac. 34;

United States v. Conklin, 169 Fed. 177, 177 Fed. 55, and the opinion of the lower court in this case (tr. p. 499).

The Revocation of Powers of Attorney Did Not Operate as Constructive Notice to Appellant The Payette Lumber & Manufacturing Company.

The sections of the Idaho Code relative to recording transfers of real property which are pertinent here, are as follows:

“Sec. 3149. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter.”

“Sec. 3159. Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

“Sec. 3160. Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

“Sec. 3161. The term ‘conveyance’ as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills.

“Sec. 3154. An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office.

“Sec. 3162. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in

which the instrument containing the power was recorded."

The constructive notice to purchasers provided for by these sections extends only to instruments in the purchaser's chain of title, and the so-called revocation was not in the chain of title of appellant, The Payette Lumber & Manufacturing Company. On examining the records appellant Company found a patent from the United States to appellee and the Reddys, a power of attorney to convey the land so patented duly signed and acknowledged by these patentees, and a conveyance through the agency of appellant Cobban to appellant Weirick in pursuance of this authority. This showed a perfect title in appellant Weirick, and appellant company was not bound to search the record a single day or a single page after this last conveyance.

Appellant might be charged with notice of an actual revocation before the conveyance to Weirick, but how can it be charged with notice of a recital or allegation of fraud in a general revocation, filed months after? It should also be noted that the agency of appellant Cobban in this case was purchased for a valuable consideration and was therefore irrevocable, even by the death of the principal.

The construction of the recording laws in Idaho and other states is absolutely clear on this point. A party is only charged with constructive notice of such facts as a proper search of the record would disclose, and he is only required to search the records for instruments in his own chain of title.

In *Harris v. Reed*, 21 Ida. 364, 121 Pac. 780, a contract of sale to Reed was recorded, although defectively acknowledged. Reed assigned this contract to another and took a mortgage for the price, which mortgage was duly record-

ed. Harris purchased from the original owner without actual notice, had his deed recorded, and now claimed priority to the contract with Reed and the mortgage to him. The court discussed the recording acts fully and held that there was no constructive notice of the contract, because it was not entitled to record, and that there could be no constructive notice of the mortgage because it was not within the chain of title and the purchaser could not be charged with constructive notice of an instrument which was in no way connected by the records with the title of his grantor.

Ely v. Wilcox, 20 Wis. 423, 91 Am. Dec. 436, is a similar but much stronger case. Here one Matson deeded land to Ely and the deed was not entitled to be recorded because defectively acknowledged. It was recorded, however, and later Matson conveyed to N. G. Wilcox, who knew of the prior deed. Matson then gave another and proper deed to Ely, who recorded it; and after this recording N. G. Wilcox conveyed to appellant T. D. Wilcox, who purchased for value and had no actual notice of either of the deeds to Ely. It was held that the first deed was not entitled to record and therefore gave no constructive notice, and that the second deed could not operate as constructive notice because T. D. Wilcox did not need to examine the records for conveyances by the original owner subsequent to the inception of his grantor's title. The court said, (91 Am. Dec. 439, 440):

“In Massachusetts, it is held that in searching the title it is not necessary to search the record as against an antecedent grantor of the land further than the registry of a deed duly executed by him, and that when such a deed has been registered, a purchaser under the grantee will not be affected with notice of a prior deed recorded subsequently but before the per-

iod of his purchase: *State v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Id. 418 (8 Am. Dec. 144); *Somes v. Brewer*, 2 Pick. 184 (13 Am. Dec. 406). And the reason given is, that when a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. The authorities are uniform to the effect that the registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed; and that a purchaser is not bound to take notice of the record of a deed executed by a prior grantee, whose own deed has not been recorded; and when the deed of a vendor is not recorded the record of a mortgage given by a vendee is not notice. There is great force in the reasoning which sustains the Massachusetts decisions. * * * No decision that we have been able to find has gone so far as we are asked to go in this case, to hold that a deed actually made, as well as recorded after the deed to a fraudulent grantee, is constructive notice to a purchaser from the fraudulent grantee to charge him with a knowledge of the title and equitable rights of the vendee in the last made and recorded deed. If we should so hold, then any vendor of land might, after he had conveyed to a *bona fide* purchaser, put on record a dozen deeds of the same land to different purchasers, and each of these would be a cloud upon the title. For these reasons we hold the record of the deed of January 23, 1856, to Ely, not notice to the appellant."

In *McLanahan v. Reeside*, 9 Watts 508, 36 Am. Dec. 136, an agreement to convey land reciting that the notes given for the purchase price were to "be chargeable on the land and be considered a lien and in the nature of a mortgage," and an absolute warranty deed in fee of the same land between the same parties, and not referring to the agreement in any way, were recorded on the same day and

in the same book known as the "Deed Book." Plaintiff obtained judgment against the grantee in this deed and the land was sold. The grantor now claimed priority as mortgagee under the recorded agreement. In holding that the judgment creditor was not charged with constructive notice of the mortgage, the Court said:

"This case is not exactly like *Friedley v. Hamilton*, 17 Serg. & R. 70 (17 Am. Dec. 638), in which a recorded conveyance and an unrecorded defeasance, constituting an unrecorded mortgage betwixt the parties, were postponed to a subsequent judgment. But though both have been recorded in this instance, the principle applicable to them is the same. They were recorded in the same volume, on the same day, and though it does not expressly so appear, most probably in juxtaposition. *But a creditor in search of a clew to the title, would necessarily stop at a conveyance absolute on the face of it, and referring to nothing beyond it.* He would have no reason to suspect that further search would lead to a defeasance of which, not lying in the channel of the title, he would not, though actually recorded, be bound to take notice; as was held in *Woods v. Farmere*, 7 Watts, 385 (32 Am. Dec. 772); *for a purchaser of a regular chain of title is not bound to notice a thing which is not ostensibly attached to any part of it*, as in *Ripple v. Ripple*, 1 Rawle, 886, where a charge by the will of a deviser who had purchased by articles for his son, to whom the land was conveyed by the original owner after the testator's death, was held to require actual notice of it, in order to affect a purchase under a judgment against the son. The difference betwixt that case and the case at bar, is that here the incumbrance is of record, and there it was not; but according to *Woods v. Farmere*, if the record of the incumbrance lay not in the creditor's way, he was not bound to notice it." (Our italics).

In *Blake v. Graham*, 6 Ohio St. 580, 67 Am. Dec. 360, the Court said:

“These rules rest on the obvious reason that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection.”

In *Ford v. Unity Church Society*, 120 Mo. 498, 23 L. R. A. 561, Mrs. C. purported to convey a fourth interest in a piece of property to one Ford before she acquired title, and this deed was recorded. Subsequently she acquired title and then conveyed to the predecessors of defendant. All the deeds in defendant's chain of title were properly recorded and Ford's successor tried to charge these parties with constructive notice of the original deed to Ford. It was held that the prior deed was not in the chain of title, and that no constructive notice could be imputed to defendants. The Court said:

“Now, as to the second purchaser,—one who buys after the vendor acquires a title. He searches till he finds the deed to his vendor, and traces the title back to its source. He finds it regular, and that since his vendor acquired the title he has not conveyed to any one else. He is not expected to look for conveyances from his vendor prior to the time the vendor acquired the title.”

Other cases are cited *supra* under “Points and Authorities.”

It is thus clearly shown that no constructive notice to appellant The Payette Lumber & Manufacturing Company of any defect in the title can be implied from the recording of this instrument which was wholly outside of its chain of title. When appellant had examined the records

and found the power of attorney to convey and the conveyances to appellant Weirick and had found that there was no attempted revocation of this power prior to the dates of such conveyances, its duty was fully discharged and it could not be affected in any way by the recording of any subsequent instruments by appellee purporting to revoke these powers of attorney or to indicate that they were fraudulent or unauthorized.

The Trial Court seems to intimate at page 517 of the record that the fact that the administrator and administratrix of the estate of Patrick Reddy executed these powers of attorney, puts appellants Cobban and Weirick on inquiry to ascertain whether they had any authority to designate an agent to convey lands in Idaho, and that as inquiry *might* have led to a full disclosure of all the facts, appellants Cobban and Weirick were charged with notice of everything to which such inquiry might have led. The Reddy estate however, has never made any objection to the method of handling this scrip. On the contrary, its representatives received \$10,400.00 from Benson after notice of the existence of these powers of attorney and all the facts in connection with the exchange. It should also be remembered that appellee and the representatives of the Reddy Estate had no beneficial interest in the right to select lands in lieu of the Monache lands because this right was purchased by appellant Cobban and their interest was at most a claim to the bare legal title under the patents from the Government. This inquiry, therefore, could not possibly have led to appellee and her unfounded claims of fraud in the original execution of these powers of attorney.

Furthermore, when appellant, The Payette Lumber & Manufacturing Company, purchased, the powers of attorney had been recorded for about two years and there was

nothing on the record prior to the conveyances from appellant, Cobban, to appellant, Weirick, to show that either the appellee or the heirs or devisees of the Reddy Estate had made any objection to the exercise of these powers of attorney. After this lapse of time, surely, the appellant company was entitled to rely on the facts shown by the record without any further inquiry as to the right to create this agency.

This same contention was made by appellee in this Court in *United States v. Conklin*, 177 Fed. 55, and before the Supreme Court of California in *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, but was by both courts considered immaterial, as the Reddy estate was not making any complaint that the agreement of August, 1900, had not been carried out in every detail, and there can be no presumption that inquiry to the representatives of that estate would have brought any information as to the grievances of appellee.

Appellants Are Not Affected by Escrow of Papers in San Francisco.

There is some vague testimony in the record to the effect that the money should be paid by Benson through the Anglo-California Bank. This, appellee contends, meant that the papers should be deposited in escrow and that Benson, as purchaser, should be entitled to the deeds upon payment of \$3.80 per acre, and that the deeds were to be made out to Benson as grantee. That Benson was not to be the grantee is clear from the evidence and the surrounding circumstances. The deeds were actually made out to the United States and so read when they were signed by appellee. The District Court, however, fell into the error of assuming that it must have been the intention that the deeds to the United States were to be deposited

in escrow with the Anglo-California Bank, to be delivered only upon payment by Benson of the amount above stated.

This was not the understanding of Mr. Benson as is clearly apparent from his letters concerning the transaction (tr. p. 476, Exhibit "N-1"), and from his own testimony. It is also clearly inconsistent with the surrounding circumstances, particularly the Act of June 6, 1900, which took effect on October 1, 1900, and which limited the application of Monache and other forest reserve scrip to surveyed land.

All parties were apparently endeavoring to clear the title to the property and secure the execution and recording of the deeds so that the Monache lands might be conveyed to the Government prior to October 1, 1900, thereby adding to the value of the scrip or its salableness. The agreement which was reached in Mr. Campbell's office in August, 1900, was undoubtedly made with the view of taking advantage of the Act, and this had to be done within some six weeks after the agreement was reached.

These important surrounding facts and circumstances were entirely overlooked by the District Court. The papers were never deposited in escrow, but the court said that "the power of Campbell was analagous to that of an escrow holder. The understanding was that he should make a deposit of the papers in escrow, and, having failed to comply with that understanding, he must be deemed to have retained them in substantially the capacity of an escrow depositary; certainly his authority to deliver was no greater than would have been the authority of the Anglo-California Bank if, in accordance with the agreement, it had received them under the stipulated instructions." (Tr. 514.)

The Court erroneously assumed, apparently without examining or considering the question, that

Campbell's authority to deliver the papers was no greater than would have been the authority of the bank if the parties had actually deposited the papers in the bank with clearly defined instructions as to the terms of delivery. Campbell had never been agreed upon as an escrow holder. Appellee has contended throughout that he was her agent and attorney and if so he could not hold the escrow. She received the papers from the messengers which she assumed came from Mr. Campbell's office, and she delivered them to messengers from Mr. Campbell's office after they had been signed. She claims that she was relying upon Mr. Campbell and considering him as her agent. Campbell, on the other hand, disavows the agency and disclaims acting for appellee in any capacity. He did not consider himself escrow holder and did not know that he occupied such a position, and it would seem that he could not be charged with a duty or responsibility of which he was not aware. The papers were not held in escrow by Mr. Campbell, and it was never agreed or intended they should be deposited with him as escrow holder. But assuming for the sake of argument that he did in fact hold the papers in escrow, and that his instructions were sufficiently definite so that any one could say when he complied with and when he violated the terms of the escrow, we still insist that there is no authority for the proposition that a deed delivered under such circumstances by an escrow holder, (and appellee claims it was only the deeds that were to be deposited in escrow), does not, as against an innocent purchaser who has neither actual nor constructive notice of the unauthorized delivery, pass title.

It should be noted here that the deeds which were to be placed in escrow were those conveying the Monache lands to the Government, and the District Court found that ap-

pellee by bringing this suit ratified the delivery of such deeds.

The Supreme Court of Indiana in *Quick vs. Milligan*, 108 Ind., 419, had before it a case where the grantor was infinitely more careful than was appellee in the case at bar. In that case the grantor sent the deed by mail to her sister with instructions to deliver it to the grantee only upon condition that he paid the amount of the purchase money, and not to deliver it until the money was paid. The deed was delivered by the escrow holder on the false and fraudulent representations of the grantee that he would immediately mortgage the land and thus obtain money to pay for it. The grantor knew nothing about the deed having been delivered. As soon as the deed was recorded the grantee, being in possession of the land, sold it to a third person who had no notice of any fraud in securing the deed from the escrow holder. The grantor brought suit to recover the land on the ground that the deed passed no title as it was wrongfully taken out of escrow. The Court reviewed the authorities on the relation of the escrow holder to the parties and the effect of the wrongful delivery of the deed upon both the grantor and the innocent purchaser. In discussing the principle of law that as between the grantor and the grantee no title passed by delivery of the escrow in violation of the instructions, the Court said:

“If this proposition is broad enough to cover the case, the appeal must be sustained; but we cannot grant this essential requisite, for there remains the question of estoppel. It might be conceded that in ordinary cases, where the grantor remains in possession, the delivery of a deed, by one who receives it as an escrow, in violation of the conditions upon which he was authorized to deliver it, would not make the

need effective to convey title, and yet there might be circumstances which would estop the grantor from asserting title against the *bona fide purchaser*."

The Court quotes from *Dickerson v. Colgrove*, 100 U. S. 578, as follows:

"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

Many authorities are cited by the Indiana Court, and further on its decision it says:

"The wrong constituting the legal fraud is the repudiation of what the conduct of the party has made appear true, to the injury of another, who in good faith has acted upon an apparent state of facts created by the conduct of the person who makes the denial of what his conduct implies. Negligence may sometimes constitute legal or constructive fraud, as is well illustrated by the forcible opinion in *Stevens v. Dennett*, 51 N. H. 324, where it was said: 'Thus, negligence becomes constructive fraud, although strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible.'

"There is another principle applicable here, and that is this: Where one of two innocent persons must suffer, he must be the sufferer who put it in the power of the wrong-doer to cause the loss, or as it has been said: 'He certainly who trusts most ought to suffer most.' Where one of the two innocent parties must suffer, he through whose agency the loss occurred

must sustain it. *Le Neve v. Le Neve*, 3 Atk. 646; *New v. Walker*, 108 Ind. 365; *Hunter v. Fitzmaurice*, 102 Ind. 449.

"It is also a familiar principle that where one is in possession of land and has a deed of record, the possession will be referred to his deed, unless there are facts known to one who is about to acquire an interest in the land indicating a different possessory right. 1 Washburn Real Prop., Sec. 95. Possession is often presumptive evidence of title, and one who finds on record a deed duly executed and recorded may surely act upon the presumption that as the paper title and the possession coincide, the possession is under the deed. 1 Washburn Real Prop., Sec. 35.

"In discussing a question very similar to the one before us, Marshall, C. J., said: 'Titles which according to every legal test are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously constructed, if this principle were overturned.' *Fletcher v. Peck*, 6 Cranch 87, 133. This doctrine was unqualifiedly approved in *Somes v. Brewer*, 2 Pick, 184; S. C., 13 Am. Dec. 406.

"It is clear to our minds that these principles carry the case for the appellee, for it was the appellant who put it in the power of the wrongdoer to do the act complained of. She it was who suffered him to remain in possession of the land, and placed in another's hands a deed which gave to that possession the fullest and most complete *indicia* of absolute ownership. The purchaser found the vendor equipped with the most

potent evidences of ownership, for he had a recorded conveyance, and he had possession. There was nothing wanting to an absolute and perfect title so far as visible and ascertainable facts disclosed."

The Supreme Court of Pennsylvania, in *Blight v. Schenck*, 10 Penn. St. 285, had before it a case where it was claimed the escrow holder had wrongfully delivered a deed and the grantor sought to set aside the conveyance. The Court in that case said:

"But, granting the deed was deposited with Curtis, as an escrow, to be delivered only on the performance of a special condition, and in violation of his instructions, he delivered the deed without exacting payment, does that avoid the title of the defendant who is a *bona fide* purchaser without notice? This is the next question. The first reflection which strikes us is that, if a title may be avoided under such circumstances, no purchaser is safe. This is a strong case, for here the defendant is an innocent purchaser for value. He invests his money on the faith of the solemn acts and declarations of the plaintiff. These acts and declarations are made before a magistrate, duly empowered for that purpose, certified to by him in proper form, duly recorded on the records of the county, which, by the act of 1715, is to have the same force and effect for giving possession and session, and making good the title and assurance of the law, as a deed of feoffment, with livery of seisen, etc. Moreover, it appears that, at the time of the purchase, the vendee was in the actual possession of the premises. There was, therefore, nothing to put him on his guard. *It must require a very strong case, as the plaintiff in error justly contends, to permit a grantor to aver against the confidence thus reposed in his acts and declarations, exactly the opposite of those acts and declarations to say, after acknowledging before the proper officer of the law that he delivered the deed, that he*

never delivered it, and having acknowledged that he received the purchase money, that he never received it."

In that case, as in this, the grantor's plea was the fact that he had not received pay for his land, and referring to that, the Court said:

"But his only equity is that he has not received his purchase money; and, as the plaintiff justly contends, his equity is equal, for he has paid his purchase money. But, where the equities are equal, as has been often decided, the legal title must prevail. It is a wholesome maxim of the law, that, where one of two innocent persons must suffer a loss, and a fortiori in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. A party who enables another to commit a fraud is answerable for the consequences; so, if a party says nothing, but, by his expressive silence, misleads another party to his injury, he is compellable to make good the loss, and his own title is made subservient to the confiding purchaser. This is text law; Story's Eq. Secs. 388, 439; 1 Fonbl. Eq., b. 1, c. 8, Sec. 4, n.

"Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. *If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority or may commit a wrong by acting knowingly contrary to them.*

"But this principle must not be extended to a person who has no possible means of protecting himself, who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be. If the grantor is in-

jured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good."

In that case the Court held that the deed was not void, but was voidable merely as between the original parties to it. It said:

"It is not the case of condition, but the ordinary case of a breach of instructions, which at most makes the deed voidable, but not void." The agent has the power to deliver the deed, and when he does not comply with his instructions, he becomes answerable to his principal. If this principle be sound, the deed would be void by the omission to receive one cent of the purchase money, a proposition which would shock the common sense of every man."

The Supreme Court of Maine in *Hubbard v. Greeley*, 84 Me. 340, had this same question before it and it held as did the Court above. It quotes with approval from the Supreme Court of Massachusetts:

"But the deed had been recorded, and the grantee had conveyed to an innocent purchaser for value, and the Court held that the title of the latter must be protected. It is a just rule, said the court, that when a loss has happened, which must fall upon one of two innocent persons it shall be borne by him who was the occasion of the loss, even without any positive fault committed by him."

Referring to escrows, the Court says:

"Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered. They clothe the grantees with apparent titles which are not real titles. Such

deeds are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it; and that in no other way can the public be protected against the intolerable evil of having our public records encumbered with such false and deceptive instruments."

The Supreme Court of California in *Schultz v. McLean*, 93 Cal. 329, uses substantially the same language in a case where a deed was delivered contrary to instructions. It quotes with approval from the Supreme Court of Pennsylvania the general proposition which is applied by the Courts in cases of this kind that "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two that has accredited him ought to bear the loss."

In conclusion, we respectfully submit that the decree of the District Court must be reversed and set aside with directions to dismiss the bill, for the case of appellee is devoid of equity and the recovery was on a theory totally different from that upon which the bill was founded and the case was tried;

Appellee seeks equity without offering to do equity, and she was not required under the decree to do equity before she could recover. Appellants have for some twelve years paid annually the taxes levied against the lands of which appellee claims to be the owner. They have protected them against fire and other depredations, and greatly enhanced their value, but there is no provision in the decree for reimbursement for such expenditures.

Appellants are innocent in fact and innocent in law: They purchased without knowledge of the alleged secret limitations on Benson's agency—limitations which were wholly inconsistent with the apparent authority with which he was clothed; and appellants Weirick and The Payette Lumber & Manufacturing Company purchased for value, relying upon the title as shown by the records in the office of county recorder of the county in which the lands are situated.

Appellee is guilty of laches; She claims to have become apprehensive of Benson in the year 1901, and learned in December of that year that the Monache lands had been conveyed to the Government and the scrip sold to diverse and sundry persons. Yet, she commenced no action to protect her rights or to claim title to the property until September, 1905, after most of the witnesses familiar with the transaction had died.

She has ratified in part the acts of her agent but seeks to disaffirm the parts which are not to her interest.

She is clearly subject to the maxim, that where one of two innocent persons must suffer, he must be the one to suffer who put it in the power of the wrong-doer to cause the loss, or, as is sometimes said, "He who trusts most, ought to suffer most." If any wrong has resulted to appellee, it was caused by the acts of the agent whom she selected, and she and not appellants should bear the loss.

Respectfully submitted,

RICHARDS & HAGA AND

McKEEN F. MORROW,

Solicitors for Appellants,

Residence, Boise, Idaho.

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No. 2236

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. M. COBBAN, E. B. WEIRICK, individually,
and also as trustee, and the PAYETTE
LUMBER AND MANUFACTURING COMPANY
(a corporation),

Appellants,

VS.

MOLLIE CONKLIN,

Appellee.

Appeal from the United States District Court for the District of
Idaho, Southern Division.

BRIEF FOR APPELLEE.

Statement of the Case.

This suit was commenced by the appellee on September 7, 1905, seeking the cancellation of certain alleged and pretended powers of attorney alleged to have been fraudulently procured from the appellee

in blank and fraudulently bearing certification of acknowledgment by notaries public and in which pretended powers of attorney the name of R. M. Cobban was inserted without the authority or consent of appellee after the alleged execution thereof; also for the cancellation of deeds executed by R. M. Cobban as attorney in fact for appellee to E. B. Weirick, as trustee, and for the cancellation of deeds executed by E. B. Weirick as trustee to the Payette Lumber and Manufacturing Company, a corporation. On April 15, 1908, an amended bill of complaint was filed by leave of court. The facts stated more in detail are as follows:

Prior to the year 1900 Alvah Russell Conklin, husband of the appellee, acquired title to approximately ninety-six hundred (9600) acres of land situated in Inyo and Tulare Counties, California, and referred to in the record and generally known as the "Monache" lands. Thereafter and prior to 1900 an undivided one-half interest in the "Monache" lands was conveyed by appellee's said husband to Patrick Reddy, brother-in-law of said Alva Russell Conklin, in payment for legal services in connection with litigation over the title to said lands. The said Patrick Reddy was a member of the law firm of Reddy, Campbell & Metson of San Francisco. Subsequently and before the year 1900, the "Monache" lands were included in the Sierra Forest Reserve under the Act of Congress of June 4, 1897 (30 Stats. 36). Land so included in a forest reserve could be by the owners conveyed to the United States and an equal area of

public lands outside the Forest Reserve selected in lieu thereof, the lands selected being generally known as lieu lands and the lands in the Forest Reserve conveyed to the United States, being generally known as base lands. To make such exchange, it was required that the owner execute a deed, conveying the base lands to the United States and have such deed recorded in the proper county recorder's office and thereafter file the same together with an abstract, showing clear and unencumbered title in the United States, in the United States Land Office, together with an application to select other specifically described lands in lieu of the surrendered lands. Under the regulations of the Land Department, the right to make selection of lieu lands was held to be non-assignable and therefore patents always issue for lieu lands to the grantors of the base lands (Transcript 495).

Alvah Russell Conklin died prior to the year 1900 and at all times during the year 1900, the estate of said Conklin was in course of probate, the appellee being the executrix of his estate and the firm of Reddy, Campbell & Metson being her attorneys as executrix, the appellee having settled with the firm of Reddy, Campbell & Metson for services as her said attorneys on June 6, 1900 (Transcript 469). The said Patrick Reddy died April 26, 1900, and thereafter the firm continued as Campbell, Metson & Campbell. On July 11, 1901, the firm of Campbell, Metson & Campbell procured an amended decree to be entered in the

matter of the estate of Alvah Russell Conklin, involving the base lands in Tulare County, California (Transcript 464, Complainant's Exhibit 5), and this was done entirely without the knowledge of Mollie Conklin.

After the death of Mr. Reddy, the firm of Campbell, Metson & Campbell, of which Joseph C. Campbell was a member, were the attorneys for the executor and executrix of the Reddy estate and said estate was at all times in 1900 in course of being probated. In 1900, John A. Benson, who was a land attorney of San Francisco, was a client of the firm of Reddy, Campbell & Metson. After the death of Patrick Reddy, John A. Benson entered into negotiations through Joseph C. Campbell of the firm of Campbell, Metson & Campbell for the purchase of the "Monache" lands, and in this connection, a meeting was held between Mr. Benson and Mrs. Reddy and Joseph C. Campbell in Mr. Campbell's office. Thereafter, Mrs. Reddy, the appellee, Mollie Conklin, N. E. Conklin, her son, John A. Benson and Joseph C. Campbell had a conference with reference to the sale of the "Monache" lands (Transcript 125-319-399), at which meeting the details of the sale were talked over and discussed and a net price of \$3.80 per acre for the "Monache" lands agreed upon.

There is a conflict in the testimony as to the exact nature of this contract, the appellee's testimony being that the lands were to be sold Benson for \$3.80 per acre, deeds to be placed in escrow

and not to be taken out until the money was paid, which was to be within ninety days (Transcript 126-127); N. E. Conklin, who was present at said conference testifying to the same facts (Transcript 201). Joseph C. Campbell testifies that the land was to be conveyed to the United States and was to be paid for at \$3.80 per acre through the Anglo-Californian Bank, upon the approval by the Land Department (Transcript 320). The witness, Joseph C. Campbell, later in his testimony, and after a more complete examination of certain letters and records (Transcript 350), testifies positively that by the agreement, the titles of the selected lands were to be approved in the name of the appellee and the Reddy Estate and when so approved that Mr. Benson would have the right to purchase the same at \$3.80 per acre but that the agreement was that the title was not to pass out of either the Reddy Estate or Mrs. Conklin until the lands were paid for (Transcript 351); that nothing was said at such conference and no agreement had for the making of any powers of attorney to sell lieu or selected lands (Transcript 350). Mr. Benson testifies that the powers of attorney to sell the selected or lieu lands were agreed upon at that time but in this he is contradicted by the appellee, N. E. Conklin and Joseph C. Campbell. By the agreement, Benson was to prepare the necessary deeds and papers which should be submitted for signature through Joseph C. Campbell.

The court found that the appellee's version of the understanding or agreement as to payment for the lands was correct (Transcript 512-513). Counsel for appellants in their brief, page 7, call attention to the Act of June 6, 1900, which became effective October 1, 1900, limiting the right of lieu land selections to surveyed land, and call attention to transcript 391-392, but there is no evidence to show that said Act was discussed between the parties. The relations of Mr. Joseph C. Campbell and the appellee are clearly shown by the evidence, by the findings of the court (Transcript 500) and by the amended decree (Transcript 464-465) and Complainant's Exhibit "B" (Transcript 468), to be that of attorney for the appellee as executrix of the estate of Alvah Russell Conklin.

After the meeting of the parties in August, 1900, John A. Benson prepared papers and the same were sent from Mr. Benson's office to Mr. Campbell's office to be executed by the representatives of the Reddy Estate and appellee. A messenger from Mr. Campbell's office took the papers to the residence of the parties where they were signed. The evidence shows that the appellee examined a few of the papers and finding them to be all right executed the papers sent to her by Mr. Campbell, relying upon his not sending any papers that were not proper. Appellee contends that the acknowledgments were false and that she did not acknowledge any of the papers before a notary public. The evidence shows that at the time the powers of

attorney under which the defendant, R. M. Cobban, conveyed the property, were purported to have been acknowledged in the City and County of San Francisco, the complainant was not within said county and city, but was at Bakersfield, California, and that she was in Bakersfield, California, from the 1st. or 2nd of December, 1900, until August or September, 1901 (Transcript 140-141-192-193-234-301). And appellants have at no time asserted or contended, but by all of their testimony they attempt to show, that no papers whatever were ever executed before any other notary than Holland Smith, whereas nearly every power of attorney herein *purports to be executed before other notaries*. All the papers signed by the appellee were returned by her through messenger to the office of Mr. Campbell.

The defendant Benson testifies that he received all the papers through Mr. Campbell's office (Transcript 402-3).

Prior to the 19th day of February, 1901, a syndicate was formed, representing the parties shown in the transcript (244), of which the appellant, R. M. Cobban, was a member. This syndicate existed from prior to the 19th day of February, 1901, up to and including the 20th day of June, 1901 (Transcript 252). This syndicate was operating under an agreement by the terms of which the syndicate should furnish the funds to purchase lieu scrip; Mr. Cobban should act in the selection of the lieu

lands; after the approval of the selections, the lands were to be conveyed to the defendant, E. B. Weirick, trustee, for the use and benefit of the members of the syndicate (Transcript 252). The defendant, R. M. Cobban, conveyed to the defendant, E. B. Weirick, trustee, all the lands involved in this action and that such conveyance was made without any consideration and said Cobban was also a beneficiary (Transcript 252-253). During the course of the dealings between Mr. Benson and R. M. Cobban, acting for the syndicate, Mr. Cobban would wire Mr. Benson for scrip which would be forwarded to bank with sight draft attached and the papers delivered would consist of deed, surrendering the base lands to the United States, abstract of title to base lands, application to select lieu lands, powers of attorney to select lieu lands and powers of attorney to convey lieu lands, the record showing that in all cases the application to select lieu lands were blank as to the lands to be selected; that the powers of attorney to select lieu lands were blank as to the name of the attorney in fact and the lands to be selected, and that the powers of attorney to convey were blank as to the name of the person to be appointed as attorney in fact, and did not describe the lands to be conveyed; the appellants R. M. Cobban and E. B. Weirick, individually and as trustee, pleading in their answer (Transcript 88 to 98, inclusive), the form and effect of the several papers so delivered and admitting that the said powers of attorney although purporting to be signed

and acknowledged by the complainant and the representatives of the Reddy Estate were blank as to the person to be appointed attorney under the power. That Cobban did pay to the bank for the use of Benson, the amount agreed upon and did insert or cause to be inserted in the said powers of attorney to select, and powers of attorney to convey selected lands, his own name as the attorney in fact (Transcript 259-261-270).

Mr. Cobban testifies that he did not know and never saw appellee (Transcript 260); that he was never authorized directly or indirectly by the appellee to insert her name in said powers or either of them (Transcript 270), but that he *assumed* or *considered* he was authorized (Transcript 271); that Mr. Benson in selling the scrip, did not show any authority, authorizing him to insert his name in any instrument executed and acknowledged by the appellee (Transcript 270-271); that he received the papers in blank and assumed a right to insert in such instruments such things as he thought necessary (Transcript 427). That in receiving such papers and making such selections, he was acting as agent for the syndicate, of which the R. M. Cobban Realty Company and others were members and of which he was a stockholder (Transcript 270-271). The selection of the land involved in this case was approved by the United States and was patented in the name of Mollie Conklin and Emily M. Reddy and Edward A. Reddy, administratrix and administrator of the estate of Patrick Reddy, deceased

(Transcript 157-158), and that the same lands were afterward conveyed by R. M. Cobban as attorney in fact for Mollie Conklin and Emily M. Reddy and Edward A. Reddy, administratrix and administrator of the estate of Patrick Reddy, deceased, under the said powers of attorney which had been signed in blank by the appellee and her co-owners, to the defendant, E. B. Weirick, as trustee (Transcript 497-498). Later, appellants Weirick and Cobban, acting for the syndicate, gave an option to purchase the lands to Mr. Musser or Mr. Deary, which was later assigned to the appellant, Payette Lumber and Manufacturing Company (Transcript 254). On the 19th day of May, 1903, the lands involved were conveyed by E. B. Weirick, trustee, to the Payette Lumber and Manufacturing Company (Defendant's Exhibit "A", Transcript 485). The appellee was paid through Campbell & Metson's office the sum of \$2750.00 on account of the conveyance of the "Monache" lands, and the Reddy Estate was paid \$13,000.00 (Transcript 392-395-423).

In December, 1901, N. E. Conklin was employed by his mother to investigate her matters in connection with the "Monache" lands, for the reason that she was getting no money from the same (Transcript 205). The letter from Joseph C. Campbell and the letter from John A. Benson to Mr. Campbell (Complainant's Exhibits "N" and "N-1", Transcript 475-478), show the steps taken by Mr. Conklin in the investigation of this matter.

That N. E. Conklin went to the county seat of Tulare County and investigated the public records and discovered the deeds of record, conveying the land to the United States. That he first learned that powers of attorney were in existence in July, 1902 (Transcript 214). That the first information that Mr. Conklin had or was able to obtain as to the existence of powers of attorney for the sale of lieu lands or selected lands was obtained in July, 1902, and that the powers of attorney so claimed were executed to C. L. Hovey of San Francisco (Transcript 224). That the first knowledge that any powers of attorney or any alleged powers of attorney were being used in the State of Idaho was obtained in October, 1903 (Transcript 225-226). That on January 16, 1903, Mollie Conklin filed in the office of the county recorder of Boise County, Idaho, a general revocation of all powers of attorney (Transcript 227-228). That such revocation was on file and recorded in Boise County for five months or more prior to the time that the deed was made by the appellant Weirick as trustee to the appellant Payette Lumber and Manufacturing Company.

The actual fraud perpetrated by John A. Benson upon the appellee is particularly shown in letter (Complainant's Exhibit "N", Transcript 476-478), in which he states that the lands had been selected upon the agreement that the parties in whose interest the same had been filed would pay the amount agreed *upon a deed conveying the rights of the owners* (Transcript 477). This letter

was dated December 11, 1901. The record shows that all the lands involved in this action had been paid for by the persons in whose interest it is claimed the same were located on and before the 20th day of July, 1901.

The appellee did not refuse to accept money from Benson until April, 1903 (Transcript 484, Complainant's Exhibit "U").

The District Court held that the papers executed by the appellee, being in blank, could not confer upon the appellant, Cobban, the power to convey (Transcript 509-512); that the papers were delivered to Mr. Campbell under such circumstances as to vest him with the powers analagous to that of an escrow holder, and that the complainant would not be bound by any act of the escrow holder in violation of his instructions in delivering the papers until the purchase price was paid (Transcript 512-516); that the papers involved were obtained by Mr. Benson by deception or through inadvertence of clerks in Mr. Campbell's office and that his acceptance and use of the same was a fraud upon the appellee (Transcript 517).

The District Court does not hold that the appellants Weirick and the Payette Lumber and Manufacturing Company are in fact innocent purchasers for value and the record does not disclose the facts that would place them in the position of innocent purchasers. Weirick by reason of his association with Cobban was a party to and is charge-

able with presumptive knowledge of the unauthorized acts of Cobban in the insertion of the name in the blank powers of attorney. Weirick took the deed as trustee without consideration and was designated in the deed as trustee. The conveyance of Weirick, trustee, to the Payette Lumber and Manufacturing Company was made by Weirick as trustee and the Payette Lumber and Manufacturing Company did not make any investigation as to the facts and circumstances under which Weirick was acting as trustee.

Points and Authorities.

Where the facts essential to entitle plaintiff to relief are averred in the bill and supported by the proof and the facts found as the basis of the decree are substantially the same as alleged in the bill, it is not a ground of error in the decree that the facts found in support of the decree vary in some important particulars from those alleged in the bill.

16 Cyc., 483;

Burr v. Botsford, 13 Conn. 146;

Campbell v. Ayres, 6 Iowa 339;

Jeanerett v. Radford, Rich. Eq., 1as (S. C.) 469;

Synott v. Shaughnessy, 130 U. S. 572; 32 L. Ed. 1038.

Where in a bill, fraud has been charged but other matters are alleged which give the court juris-

diction, the proper course is to dismiss only so much of the bill as relates to fraud and give so much relief as under the circumstances plaintiff may be entitled to.

Daniels Ch. Pr., 6 American Ed., Sec. 382.

When the facts and proceedings as to a transfer of title are fully disclosed in the bill and point to fraud and wrong, and equally to inadvertence and mistake if later be shown the bill is sustainable.

Williams v. U. S., 138 U. S. 514, 524; 34 L. Ed. 1026.

Possession by plaintiff in action to remove a cloud is not always necessary. Where the estate or interest is equitable the jurisdiction should be sustained whether plaintiff is in or out of possession.

When a party out of possession has an equitable title or where he holds the legal title, under circumstances that the law cannot furnish full and complete relief his resort to equity to have a cloud removed ought not be questioned.

Pomeroy's Eq. Jurisprudence, Vol. 6, Sec. 731;

Sayers v. Burkhardt, 29 C. C. A. 137;

Gage v. Kaufman, 133 U. S. 471; 10 Sup. Ct. 406;

Coal Co. v. Doran, 142 U. S. 417, 449; 12 Sup. Ct. 239;

Rich v. Braxton, 158 U. S. 375, 406; 15 Sup. Ct. 1006;

Harding v. Ginee, 42 U. S. App. 411; 25
C. C. A. 352; 80 Fed. 162;
Christian v. Vaner, 41 W. Va. 753; 24 S. E.
596.

Under the statutes of the State of Idaho, any person having claim or interest in real estate may maintain action regardless of possession.

Sec. 4538, Revised Codes of Idaho;
Coleman v. Jagers, 12 Idaho 125; 85 Pac.
894.

Section 4538, Revised Codes of Idaho, is identical with 738, Code of Civil Procedure of California, and the same rule has been followed in California.

People ex. rel. Lorr v. Center, 66 Cal. 551-6;
5 Pac. 263; 6 Pac. 481.

The federal courts have power and jurisdiction to enforce rights created and administer remedies provided by State statutes, for enforcement and administration in courts of the State, either at law or in equity.

Darragh v. Utter Mfg. Co., 23 C. C. A. 609;
Ex parte McNiel, 13 Wall. 236;
Cummings v. Bank, 101 U. S. 153, 157;
Trust Co. v. Krumseig, 23 C. C. A. 1; 77
Fed. 32.

An enlargement of equitable rights by State statute may be administered by National courts as well as courts of the State.

Darragh v. Utter Mfg. Co., *supra*;
Case of Broderick's Will, 21 Wall. 503, 520;

- Clark v. Smith, 13 Pet. 195, 202;
 Holland v. Challen, 101 U. S. 15-25, 3 Sup.
 Ct. 495;
 Forst v. Spitley, 121 U. S. 552, 557; 7 Sup.
 Ct. 1129;
 Reynolds v. Bank, 112 U. S. 405; 5 Sup. Ct.
 213;
 Chapman v. Brewer, 114 U. S. 158, 170, 171;
 5 Sup. Ct. 799;
 Gormley v. Clark, 134 U. S. 338, 348, 349;
 10 Sup. Ct. 554;
 Bardon v. Improvements Co., 157 U. S. 327,
 330; 15 Sup. Co. 650;
 Cowley v. R. R. Co., 159 U. S. 569, 583; 16
 Sup. Ct. 127.

A party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of that locality.

- Darragh v. Utter Mfg. Co., *supra*;
 Ex parte McNeil, *supra*;
 Davis v. Gray, 16 Wall. 203, 221;
 Cowley v. R. R. Co., *supra*.

Where the statute of a State enlarges the ancient jurisdiction of courts of equity in respect to suits to quiet title but equitable rights remain, the enlargement thereof may be administered by the courts of the United States as well as by the State courts.

- Divine v. Los Angeles, 202 U. S. 312; 50
 L. Ed. 1046;
 Broderick's Will, *supra*;

Holland v. Challen, *supra*;
 Gormley v. Clark, *supra*;
 Moore v. Steinbach, 127 U. S. 70-84; 32 L.
 Ed. 51-56;
 Reynolds v. Bank, *supra*;
 Chapman v. Brewer, *supra*;
 U. S. v. Wilson, 118 U. S. 86, 89; 30 L. Ed.
 110, 112;
 Frost v. Spitley, *supra*.

A deed or other instrument affecting title to real estate passes no interest if it had no grantee, but authority to fill up blank may be given by "parol".

Allen v. Withrow, 110 U. S. 119; 28 L. Ed.
 90;
 Dewey v. Foster, 2 Wall. 33; 69 U. S. 781;
 Swartz v. Ballou, 47 Ia. 188;
 Van Ella v. Evenson, 28 Wis. 33;
 Field v. Stagg, 52 Mo. 534;
 Devlin on Deeds (3d Ed.), Sec. 456.

To make a deed or other instrument affecting title to real estate, executed in blank, operate as a conveyance of the property, it is essential that the blank be filled by the party expressly authorized to fill it, and this must be done before or at the time of delivery to grantee.

Allen v. Withrow, *supra*;
 2 Cyc., 157;
 Arguello v. Bours, 67 Cal. 447; 8 Pac. 49.

Where the execution of a deed is procured by deceit it is a forgery and the question of good faith does not arise.

McGinn v. Toby, 62 Mich. 252; 4 Am. St. Rep. 848;

Camp v. Carpenter, 52 Mich. 375;

D'Wold v. Hayden, 24 Ill. 525;

Griffiths v. Kellogg, 39 Wis. 293;

Devlin on Deeds, Sec. 228;

Where a deed has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent, no title passes whatever, and a subsequent purchaser is not protected.

Gould v. Wise, 97 Cal. 532;

Fitzgerald v. Goff, 99 Ind. 28;

Henry v. Carson, 96 Ind. 412;

Everts v. Agnes, (Wis.) 65 Am. Dec. 314;

Arguello v. Bours, *supra*.

Acknowledgment of power of attorney to sell was necessary before the deeds executed under powers could be recorded. Appellants relying upon recorded title cannot repudiate the forged and false acknowledgments appearing upon the record of the powers of attorney.

Revised Codes of Idaho, Sec. 2994;

Revised Statutes of Idaho, 1887, Sec. 2994.

Where recorded title is relied upon, and acknowledgment of the instrument was a condition precedent to such recording, there could be no

instrument to acknowledge until the blanks were filled and the instrument completed.

The act of the officer in certifying an acknowledgment to an instrument in blank is a nullity and the acknowledgment and blank instrument are no more than waste paper.

Drury v. Foster, 2 Wall. 24 (U. S.); 17 L. Ed. 780.

A deed, signed and acknowledged leaving the grantee's name blank and afterwards filled in with a name which grantor did not authorize is void and is ineffectual as if an entire forgery.

Burke v. Borns, 92 Cal. 112; 28 Pac. 57;

Arguello v. Bours, *supra*;

Vaca Valley R. Co. v. Mansfield, 84 Calif. 561; 24 Pac. 145.

Powers of attorney in connection with the sale of so-called "scrip" that are blank at the time they leave the possession and control of the maker are utterly void, and the subsequent filling of the blanks so as to make it appear to be complete, and valid, is a forgery.

Puget Mill Co. v. Brown, 54 Fed. 987. Affirmed 7 C. C. A. 643.

The addition of the word "trustee" to the name of a person is notice of a trust and calls for some inquiry. An examination puts the purchaser upon

inquiry and is constructive notice of everything to which that inquiry would lead.

Mayberry v. Ehlen, 20 Am. St. Rep. 467;

Min. Nat. Bank of Parsons, 40 Am. St. Rep. 299;

Johnson v. Colman, 41 Am. St. Rep. 284.

Any knowledge of the existence of a fact tending to impeach or cut down the title of a vendor is sufficient to put a purchaser on notice and inquiry, and inquiry must be directed to ascertain the facts.

Bigelow Equity, Chapt. XI, page 182, Sec. 1;
also Chapt. II, Sec. 1.

The doctrine of bona fide purchaser without notice does not apply to total absence of title in vendor. The good faith of a purchaser cannot create a title where none exists.

Dodge v. Briggs, 27 Fed. 160;

Hyde v. Shinn, 199 U. S. 83.

To invoke the doctrine of a bona fide purchaser there must be a genuine instrument having a legal existence as well as one appearing on its face to pass title. It cannot arise on a forged instrument, or one executed to no parties at all.

Hyde v. Shinn, *supra*.

To claim defense of bona fide purchaser for valuable consideration answer must allege the deed of purchase, date, parties and contents. That vendor was seized in fee and in possession. The consideration, and that it was bona fide and truly paid

independently of the recital in the deed. How the grantor acquired title, and notice denied previous to and down to the paying of the money and delivery of the deed.

Boone v. Childs, 10 Pet. 193;

Flagg v. Mann, 2 Summ. 485-557.

Power of attorney was not a conveyance, and conveyed no powers coupled with an interest.

Hunt v. Rousmainer, 8 Wheat. 174;

Freeman v. Rohn, 58 Cal. 115.

Power of attorney may be revoked by filing revocation, acknowledged and recorded in the same office as the power.

Sec. 3162, Revised Codes of Idaho.

An agent with limited power cannot bind his principal when he transcends his power and a person transacting business with him on the credit of his principal is bound to know his authority.

Schunmelpennich v. Bayard, 1 Pet. 264; 7 L. Ed. 138.

An unauthorized delivery of deed does not operate to transfer title.

16 Cyc., 581;

Skinner v. Baker, 79 Ill. 496;

Berry v. Anderson, 22 Md. 36;

Harkreader v. Clayton, 56 Miss. 383; 31 Am. Rep. 369;

Tyler v. Cate, 29 Ore. 515-525; 45 Pac. 800;

Patrick v. McCormick, 10 Neb. 1; 4 N. W. 312;

Black v. Shriver, 13 N. J. Eq. 455;
 Smith v. South Royalton Bank, 32 Fed. 341;
 76 Am. Dec. 179;
 Chipman v. Tucker, 38 Wis. 43; 20 Am.
 Rep. 1;
 Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A.
 445.

A different rule applies to deed placed in escrow
 from that which applies to negotiable instruments.

Fearing v. Clark, 16 Gray (Mass.) 74; 77
 Am. Dec. 394;
 Provident L. etc. Co. v. Mercer Co., 170 U. S.
 593-604; 42 L. Ed. 1156;
 Devlin on Deeds, 3rd Ed., Sec. 322;
 Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A.
 445;
 Calhoun v. American Emigrant Co., 93 U. S.
 124; 23 L. Ed. 826;
 Knapp v. Nelson, 41 Colo. 447; 92 Pac. 912;
 Tyler v. Cate, 29 Ore. 515; 45 Pac. 800;
 Bradford v. Durham, 45 Ore. 1; 101 Pac.
 897; 135 Am. St. Rep. 807;
 Powers v. Rude, 14 Okla. 381; 79 Pac. 89;
 Bowers v. Cottrell, 15 Ida. 221; 96 Pac. 936.

Argument.

Appellee in her bill of complaint charges in substance the following facts:

That a conspiracy was entered into between certain parties to induce the complainant to surrender

base lands and to select lieu lands and to sell said lieu lands and deprive appellee of the use of the same (Transcript 11-12). Then follows (Transcript pages 12-13), a detailed statement with reference to the transactions in August, 1900, in the presence of Campbell, Benson, the appellee and Emily M. Reddy, relative to the sale of the "Monache" lands. That by said agreement, Benson was to prepare the deeds in connection with the sale of said lands without expense to the complainant (Transcript 13). Said deeds when drawn and executed were to be placed in escrow (Transcript 14). That Benson prepared the deeds and submitted the same to the appellee and her co-tenants through Campbell (Transcript 15). That appellee, relying upon the promises of Benson and Campbell, signed the deeds and returned the same to Campbell and that Campbell delivered the deeds to Benson and caused the same to be placed of record (Transcript 15 and 16). That at the time said deeds were submitted for the base lands, that the complainant signed all the papers so submitted, relying upon and placing confidence in the fact that they were sent to her for signature by Campbell and believing that he would place the same in escrow (Transcript 16). That included within the papers sent her by Campbell for signature were applications to select lieu lands in place of base lands; papers purporting to be powers of attorney which were in blank, and that the said papers were signed by the appellee, as sent to her for signature by Campbell (Transcript

17). That neither Campbell nor Benson nor any other person informed appellee that she had signed deeds to base lands, conveying the same to the United States, and that appellee was never informed by Campbell or Benson or any other person that she had signed powers of attorney to convey lieu lands. That in July, 1901, complainant first ascertained that the deeds for the base lands had not been placed in escrow but that the same had been placed of record and that after ascertaining such facts, appellee was assured by Campbell that the matter could be taken out of Benson's hands at any time and that appellee further learned that the lieu lands were being selected in her name and that when patents issued to said lieu lands, the same would be issued in her name and in the name of the representatives of the Reddy Estate and her co-tenants (Transcript 18 and 19). That the powers of attorney specifically describing them were signed, if they were, by the appellee without her knowledge or consent and that the same were wholly blank at the time of their signature by appellee as to the name of the party appointed thereby as attorney in fact and that the name of R. M. Cobban had been inserted in each of said powers of attorney and the same recorded in Boise County, Idaho (Transcript 20 to 28, inc.). That the appellee did not know of R. M. Cobban, never received anything of value or consideration from him or anyone in his behalf and did not knowingly sign or authorize any person for her to sign said

alleged powers of attorney and that appellee never knowingly or consenting thereto gave a power of attorney to R. M. Cobban or to any other person to sell or dispose of or to exchange or otherwise deal in or deal with said lieu lands or any part thereof and that said alleged powers of attorney were wholly without consideration. That appellee never acknowledged said powers of attorney and never appeared in person or by proxy or otherwise before the notaries public or any of them, who appeared in said certificates of acknowledgment purporting to be annexed to said instruments. And that said acknowledgments were wholly false and untrue and were made without appellee's knowledge or consent and that said powers of attorney were false and forged (Transcript 28 and 29).

That no administration upon the estate of Patrick Reddy, deceased, had ever been had in the State of Idaho, which was known to appellants and each of them, and that said appellants and each of them well knew that neither Emily M. Reddy, as administratrix and Edward A. Reddy, as administrator, had any power whatever to make said powers of attorney or to appoint said R. M. Cobban or any other person their attorney in fact, to sell or dispose of said lieu lands (Transcript 29 and 30). That R. M. Cobban, as alleged attorney in fact, for the appellee and for Edward A. Reddy, as administrator and Emily M. Reddy, as administratrix, of the estate of Patrick Reddy, deceased,

purported to convey said lieu lands to E. B. Weirick, trustee (Transcript 30 to 33).

That no administration as to a portion of the Monache lands as to Mollie Conklin's interest had been had up to July 11, 1901, at which time it appears an amended decree was obtained, a copy thereof being discovered amongst Benson's papers (Transcript 433). Mr. Benson says he knew nothing about it, Mr. Campbell says that he knows nothing of it, and Mollie Conklin says she had no knowledge of it.

That after said conveyances and during 1902, the lieu lands were patented by the United States to appellee and Emily M. Reddy, as administratrix, and Edward A. Reddy, as administrator. That complainant did not know that said alleged powers of attorney were in existence or that said alleged conveyance to Weirick, trustee, was in existence prior to the 1st day of January, 1903. That the complainant immediately thereafter and prior to the 1st day of May, 1903, repudiated the said powers of attorney and said conveyance. That the total number of acres of base land which appellee made a verbal agreement to sell to said Benson was ninety-six hundred acres. Appellee received the sum of \$2,750.00 through the office of said Campbell, which was an *advancement* and not a payment (Transcript 357). That appellee is ready, able and willing to restore to Benson and Campbell everything of value received by her from them. That

she has not done so or offered to do so because said Campbell and Benson have by their acts, as set forth in said bill of complaint placed it beyond their power or the power of either of them to restore the appellee to the position she occupied in relation to said lands and the title thereto prior to the conveyance of said lieu lands to Weirick (Transcript 35-36).

That Cobban, Weirick individually and Weirick as trustee, Payette Lumber & Manufacturing Co., claim an interest or estate in said lieu lands adverse to appellee and none of said parties has any rightful claim, right, title or interest thereto. That the said alleged powers of attorney and alleged conveyance to Weirick, trustee, are invalid and fraudulent and forged and constitute a cloud upon complainant's title to said lieu lands (Transcript 36). That by the prayer to her bill of complaint, complainant prays that defendants be forever barred and enjoined from all claim to any estate of freehold or of inheritance in said real property and that complainant be decreed to be the owner thereof and entitled to possession of the same; for a decree of the court adjudging said powers of attorney and said alleged deed to Weirick, trustee, null and of no effect; for the appointment of a commissioner by the court and that said commissioner be directed to make and execute to appellee a full and complete release, cancellation and annulment of said powers of attorney and that they be de-

clared false and forged and that said alleged deed to Weirick, trustee, be cancelled and annulled and for general relief (Transcript 37 and 38).

By the allegations of said bill (Transcript p. 3), it is alleged that the appellee is owner in fee, and as tenant in common, of an undivided one-half interest in said lands in said bill of complaint specifically described and is entitled to the immediate possession of said land; that said lands are not in the possession of complainant nor of defendants or either of them and that said lands on the contrary are vacant, unoccupied, wild and uncultivated timber lands and are not in the possession of any person.

Upon these charges, issues were joined as between the appellee and the appellants, and the appellants Cobban and Weirick, individually and as trustees, specifically alleged that they received from Benson and without inquiry powers of attorney to sell and convey lieu lands in blank and the specific method employed by them in the completion of said instruments, all of which allegations made in the answer of said appellants and as proved by them in the testimony offered on the trial of the cause, amply bear out and corroborate the allegations made by the appellee in the bill of complaint.

The court has specifically found direct fraud to have been perpetrated by Benson, and upon this point, the court finds (Transcript 499):

“Moreover, there is no substantial foundation for the charge, elaborated at great length

in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains. While there is much in the record to support the view that Campbell failed to properly discharge his obligations to the plaintiff, it cannot be held that he conspired with Benson, or at any time entertained corrupt or improper motives. Such delinquency as in law may be properly charged against him is to be attributed to a want of personal attention upon his part, and either to his neglect to give definite instructions to his subordinates, to whom, in a measure, he intrusted the business, or to their disregard of his instructions, rather than to any design or willingness to wrong the plaintiff; I am satisfied that there was no evil intent. That Campbell owed some duty to the plaintiff cannot be controverted. She intrusted to his keeping the instruments of conveyance which were executed jointly by her and the representatives of the Reddy Estate, either because she regarded him as her attorney, or because, recognizing him as the attorney for the Reddy Estate, and reposing great confidence in him, she assumed that he would deliver the instruments only in accordance with the agreement, of the terms of which he was fully advised. Whether formally employed as an attorney or not, having, with full knowledge of

the conditions upon which they were to be delivered to Benson, received the instruments, it was his duty either to return them to plaintiff or to comply with such conditions. This, however, is not an action to determine Campbell's liability, nor is he made a party defendant, and therefore, the precise nature of his relation to the plaintiff is material only in so far as it bears upon the effect upon the plaintiff's rights, of the unauthorized and improper delivery of the instruments through his office to Benson, and by Benson to the defendants who purchased them for value and without knowledge of any wrongdoing. And in disposing of that issue, we may dismiss from our consideration all those instruments used merely in effecting an exchange of lands with the United States. Such are the deeds executed in favor of the United States, the application to select lands in lieu of those relinquished, and powers of attorney authorizing the making of such selections. This suit is based upon the theory that the plaintiff is entitled to the fruits of the exchange, namely, the lands patented to her by the United States in consideration of her relinquishment of title to the base lands, and therefore it may be held that, by prosecuting the suit, the plaintiff has ratified all proceedings relating to such exchange. There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney 'to convey' without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense,—whether the understanding was a transfer directly to Benson of the Monache lands or an exchange thereof with the Government, and thereupon a transfer of the lieu lands to Benson might designate,—according to all of the testimony, payment of the agreed

price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title, from the plaintiff. Such is the testimony of the witnesses for the plaintiff, Campbell, in the most emphatic terms, so declares, and Benson, in effect, admits that such was the understanding. It is true, I think, that when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that, having voluntarily attached her signature, she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly nor impliedly did she authorize their delivery to Benson. Campbell testifies that it was not his understanding that such instruments were ever to be executed, and that personally he was wholly unaware of their existence until after this suit was commenced. He never saw them, and did not deliver them to Benson or authorize their delivery. Benson ventures no explanation and advances no theory in justification of their delivery to him. In some way, it does not appear just how, they all reached his office bearing false notarial certificates of acknowledgment, and came from either Campbell's office or directly from the hands of the notary public. The delivery was made either by the notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertence, it was not in accordance with the original agreement, and had the authorization or consent of neither Campbell nor the plaintiff."

Again, at Transcript page 504, the court finds:

"At the hearing, counsel for the defendants, assuming that plaintiff had declined an offer of

full payment, earnestly insisted that it would be extremely inequitable to permit her to refuse substantially that for which she had contracted, and now recover title to these lands from the defendants, who have already in good faith made full payment, and I was inclined to regard such a view with much favor. But upon a most careful search of the record I do not find the assumption of tender well founded. At one point, the witness Campbell testified that the plaintiff refused further payments, but the statement is immediately qualified in such a way as to leave it practically worthless. Benson evidently seeks to leave the impression that plaintiff was unwilling to receive payment, but he seems studiously to avoid any direct statement to that effect, and clearly all of his testimony upon the point relates to a time long after he consummated the sales to, and received full payment from, Cobban. It is difficult to harmonize Benson's use of the powers of attorney and his conduct generally with the ordinary standards of honesty and fair dealing. In his letter of December 11, 1901, written to Campbell, in response to the latter's request for a report as to the status of the whole matter, he uses the following language: 'All of the land, except 400 acres, has been deeded to the United States, and deeds placed upon record, and selections made of other lands in accordance with the provisions of the Act of Congress of June 4, 1897 (30 Stats. 36).

“ ‘This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements, which in terms provided that after the land selected in lieu of the lands surrendered had been located and said locations had been accepted by the Commissioner of the General Land Office, and proper evidence fur-

nished thereof, that the parties in whose interests the locations were made, would, upon the delivery of a deed conveying the right of the owners, pay the amounts agreed upon.

“‘Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these acceptances can be had to ask for a confirmation of the sales by the court so that settlements can be made to both the owners and the parties in whose interests the locations were made. We have been bringing every effort to bear to get the Commissioner of the General Land Office to act upon these matters, and as he has lately added several to the working force in his office, it is likely we will not have very much longer to wait.’

“‘Clearly, he thus intended to give the impression that the original owners still controlled the title, and that no money had been paid by the purchasers, and that payment would be made only upon the delivery of proper deeds by the original owners, whereas in truth the fact was that, months prior thereto, he had received, in installments, the full purchase price for the scrip covering all of the lands described in the bill, and had delivered to Cobban the several powers of attorney purporting to authorize the transfer of title from the plaintiff and the Reddys to unnamed purchasers. By implication the letter recognizes the correctness of the plaintiff’s contention, that she was to convey title only upon receiving payment in full, and the fact was concealed that the instruments now under consideration were in existence at all. There were doubtless some negotiations looking to a settlement of the whole controversy, and not improbably Benson conditionally offered to make certain payments, but there never was an unconditional

or actual tender to the plaintiff of what was clearly due her upon account of the Cobban sales. From the record the inference is unavoidable that, if Benson had, during the year 1901, or during the larger part, at least, of the year 1902, offered to account for and pay over the moneys arising from the Cobban sales, he would have been met with no hesitation upon the part of the plaintiff in accepting payment, but, as appears from the letter above referred to, he was putting her demands for payment off by evasion and deception. After the plaintiff learned, through inquiries prosecuted by her son, in the year 1902, that her understanding of the agreement was being violated, and especially when it appeared that Benson had come into possession of, and had improperly disposed of, the powers of attorney to convey, not without reason she looked with suspicion upon, and was reluctant to accept, offers of partial payment. She had a right to know the facts, and this knowledge was denied to her. Benson declined to discuss the matter except through or with Campbell, and Campbell, for some reason, was very difficult of access."

Also at Transcript page 507, the court further finds:

"Not without some apparent reason, they doubtless entertained a suspicion that Benson and Campbell were in collusion for some purpose antagonistic to their interests, and that it would be useless, if not perilous, to advise them of such suspicion until certain facts had been learned from disinterested sources. While the course pursued is not free from criticism, it is not thought to be such as should debar the plaintiff from seeking relief in a court of

equity. It may be thought that the fact that the Reddys were paid much larger amounts than were paid to the plaintiff tends strongly to corroborate the theory that plaintiff refused to accept payment, but it seems that from time to time, Campbell, putting forward the needs of Mrs. Reddy for money, strongly urged Benson to make advances to her. Campbell testified that he understood that the moneys so paid were not the proceeds of sale, but were advanced from time to time by Benson, in anticipation of such sales, and in view of the statements contained in Benson's letter of December 11th, it is not improbable that from time to time he led Campbell to believe that, under the contract, there was nothing legally due from him, and that the payments which he made were to be understood as advancements only. In that view, Campbell was justified in turning over to Mrs. Reddy alone such sums as he received, for they were by Benson paid to her credit exclusively, whereas it was his duty to distribute equally between her and the plaintiff all proceeds arising from the sales of lands."

In this case, the complainant in her bill of complaint, has set forth the facts upon which she relies for recovery, not only the facts as to the fraud and conspiracy but the facts as they actually appear, and the court has found substantially that all the facts alleged by the appellee in her bill of complaint to be true, and the appellants certainly knew from the allegations of the bill, what charges they were called upon to meet and by their answer have placed in issue the very facts alleged by the complainant. At the time when Benson wrote the

letter to Campbell (Transcript 476-478, Exhibit N-1), being December 11, 1901, it clearly appears that he was directly stating that he had never received any money from the sale of any of the base lands, and the existence of the powers of attorney to convey the selected lands are necessarily by the wording of said letter denied.

“This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements which in terms provided that after the land selected in lieu of the lands surrendered had been located and said locations had been accepted by the Commissioner of the General Land Office, and proper evidence furnished thereof, that the parties in whose interests the locations were made, would, upon the delivery of a deed conveying the right of the owners, pay the amounts agreed upon.

“Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these acceptances can be had to ask for a confirmation of the sales by the court so that settlements can be made to both the owners and the parties in whose interests the locations were made” (Transcript 476-477),

and yet in the face of this statement made by Benson, we find from the pleadings of the appellants and from the records of the case that all the land involved in this case had been selected by the appellant Cobban under the purported powers of attorney and that he had fully paid Benson for

all of said land at the rate of more than \$4.00 and more per acre. This statement made by Benson is such a fraudulent statement and is primary evidence of the fraudulent intent and purpose of Benson.

And in view of all the circumstances and conditions as shown by the record and by the finding of the court, it can not be held that any of the statements made by the appellee in her bill of complaint were made recklessly. The rash and wholly unauthorized methods pursued by the appellants in accepting a title under the conditions as shown by the record would certainly justify the appellee in making all the charges which she made against the appellants or either of them.

Appellants are very prone to insist throughout their brief that they paid for this land to the agent of the appellee. This statement is not only not warranted by any evidence appearing in the record but is wholly nullified by the direct finding of the court to the effect that the appellant Benson was never under any circumstance or condition the agent of the appellee.

COMPLAINANT'S BILL IS NOT WHOLLY FOUNDED ON FRAUD AND CONSPIRACY BUT BY THE ALLEGATIONS OF SAID BILL IT APPEARS THAT FRAUD AND CONSPIRACY ARE MERE INCIDENTS TO THE ALLEGATIONS OF THE FACTS IN SAID CAUSE.

Appellees claim under these powers, and the bill alleges the false and fictitious character of the same;

lack of assent; lack of execution, consideration or delivery.

Appellants contend that the theory in this case was changed by the court in the consideration of the case and that the appellants had no opportunity whatever to meet the charges under the new theory. The record does not bear out this contention of the appellants. An examination of the bill discloses that the appellee was charging the invalidity of the powers of attorney upon which appellants' title must rest, as the very ground work and substance of her bill, alleging the alteration specifically and the fraudulent and forged certificates, the unauthorized delivery and the procuring without her knowledge or consent, and that the subsequent deeds executed by Cobban under the said alleged powers of attorney were null and void and did not suffice to divest appellee of any title to said lands or vest the same in the appellants or either of them.

The pleadings of the appellants in this case are predicated upon the same theory; they set forth the facts and circumstances relating to their acquisition of their pretended rights in the premises, which constitutes too the allegations of appellee's bill and bears out and confirms her charges and statements.

The argument before the trial court was all predicated upon such theory and the court found in conformity with the theory advanced, upon the

trial and at the argument, by the appellee and upon the very issues joined in and made, upon the record and evidence, by the appellants, and it is the appellants now who seek to change the theory of the case and to predicate their defense upon a new and entirely different theory, and to cloud the issues.

In 16th Cyc. at page 483, the rule is laid down:

“The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief. Every fact essential to entitle plaintiff to the relief which he seeks must be averred in his bill, and relief cannot be granted for matters not alleged, even though they may be apparent from other parts of the pleadings and proofs. But in the application of this rule an exact and absolute correspondence between bill and proofs is not required; if the facts found as the basis of the decree are substantially the same as those alleged in the bill, it is not a ground of error in the decree that they vary in some unimportant particulars.”

We are unable to see upon what theory appellants contend that the relief granted by the court was not within the scope of the allegations of the bill and the proofs offered in support thereof. In this case, there is no question raised as to the jurisdiction of the court over the subject matter of the action. It is shown by the pleadings and by the proofs and admitted by the appellants that the amount in controversy is sufficient to vest the

court of jurisdiction and that there is the diversity of citizenship required to vest jurisdiction of the court. Hence we believe the true rule is to be as follows:

“That the court will only grant such relief as the plaintiff is entitled to, upon the case made by the bill, is most strictly enforced in those cases where the plaintiff relies upon fraud. Accordingly, where the plaintiff has rested his case in the bill upon imputations of direct personal representations and fraud, he cannot be permitted to support it upon any other ground; but if other matters be alleged in the bill, which will give the court jurisdiction as to the foundation of a decree, the proper course is to dismiss only so much of the bill as relates to the case of fraud, and to give so much relief as under the circumstances the plaintiff may be entitled to. If the plaintiff has rested the case for relief solely on the ground of fraud, he cannot, if he fails in establishing fraud, pick out, from the allegations in his pleadings, facts which might, if not put forward as proof of fraud, have warranted the plaintiff in asking, and the court in granting relief.”

Daniels Ch. Pr. 6th Amer. Ed. I, *382.

The case of *Williams v. The United States*, 138 U. S. 514, 524; 34 Law Ed. 1026, was a case involving the title to public lands alleged to have been improperly certified to the State of Nevada. And Justice Brewer, delivering the opinion for the court, says:

“The second contention is that the court erred in finding that there was fraud or wrong by which the title was taken away from the

general government. The allegations of the bill are of fraud and wrong but they also show inadvertence and mistake in the certification of the State and it cannot be doubted that inadvertence and mistake are equally, with fraud and wrong, grounds for judicial interference to divert a title acquired thereby. This is equally true in transactions between individuals and those between the government and its patentee. If through inadvertence and mistake, a wrong description is placed in a deed by an individual and property not intended to be conveyed, is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So, if any other inadvertence and mistake vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings as to the transfer of title are fully disclosed in the bill. They point to fraud and wrong and equally to inadvertence and mistake and if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established."

Certainly, the facts in this case are fully alleged and made to appear within the bill and are fraud squarely within the rule laid down in the above cited case. The rule contended for by appellants as to the sufficiency of the bill of complaint to warrant the court in granting the relief awarded by the decree, is based solely upon cases where the defendants are misled and surprised by reason of the manner in which the bill is framed, but this cannot be true in the case at bar because all

the facts upon which the court bases the decree are fully alleged in the bill and appellants have met such allegations and put the matter in issue by the manner in which their answers are drawn, and even counsel for appellants have failed to point out any matter in which they have been taken by surprise in this case excepting upon the mere question of the proposition of possession in plaintiff being necessary in order to maintain a bill to cancel a cloud on title or prove the lands are vacant and unoccupied.

This rule is not universally correct and yet it is shown by the bill itself (Transcript, p. 3), that the complainant alleged that she was not in possession of the lands in controversy and alleged that on the contrary said lands are vacant, unoccupied, wild and uncultivated timber lands and not in the possession of any person. The appellant, Payette Lumber & Manufacturing Co., a corporation, admitted that the lands involved are wild and uncultivated timber lands by the terms of their answer (Transcript, p. 42), and the same is true of the answer of the appellants Cobban and Weirick (Transcript, pp. 67 and 68); by the testimony of E. M. Hoover, general manager of the appellant, Payette Lumber & Manufacturing Company, it is shown that the lands are in a wild and natural state and uncultivated lands (Transcript, p. 282), but under the rule and authorities applicable to cases such as those at bar, possession is not necessary.

Pomeroy's Equity-Jurisprudence, Vol. 6, Section 731, lays down the following rule:

“POSSESSION OF PLAINTIFF. ‘As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances. But where he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity. Where, on the other hand, a party out of possession, has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated, and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and dicta on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession; while, on the other hand, it is as generally stated that possession is never essential. Both

of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.' Where, however, neither party is in possession or where the lands are wild and unoccupied, it has been generally admitted that the remedy at law is inadequate and that equity has jurisdiction to remove or prevent a cloud."

In the case of *Sayers v. Burkhardt*, 29 C. C. A. 137, the court says:

"The first question presented by the assignment of errors is as to the jurisdiction of the court. Appellants insist that the court below, as a court of equity, had no jurisdiction of this case, for the reason that it was not alleged in the bill that the complainants were in possession of the land referred to therein at the time of the institution of this suit, the appellants claiming that such allegation was necessary, as the object of the suit was to remove clouds from the title to said land, caused by the existence of the proceedings and deeds mentioned. In the first place, this is a misconception of the scope of complainant's bill, for its evident purpose was not only to remove said clouds from their title, but also to set aside as fraudulent certain proceedings had in the circuit court of McDowell County, W. Va., to declare the deeds made in pursuance thereof null and void, and to decree that complainants' lands should be held by them free from the lien of certain taxes and of the claim of forfeiture set up in said proceedings. It is alleged in the bill that George J. Burkhardt died seised and possessed of the land proceeded against, and that the complainants are his legal heirs. In suits of this character, such allegations are sufficient to give a court of equity jurisdiction, for under such circumstances, where fraud is

charged, or the cloud is caused by a tax deed, the remedy at law is not plain, adequate and complete. This ground of equity jurisdiction and this rule of procedure is now so well established that it will not be questioned by this court, particularly concerning suits having reference to deeds made under the provisions of the West Virginia statutes referring to forfeited and delinquent lands in that State.

“Gage vs. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406;

“Coal Co. vs. Doran, 142 U. S. 417, 449; 12 Sup. Ct. 239;

“Rich vs. Braxton, 158 U. S. 375, 406; 15 Sup. Ct. 1006;

“Harding vs. Guice, 42 U. S. App. 411; 25 C. C. A. 352, and 80 Fed. 162;

“Christian vs. Vance, 41 W. Va. 754; 24 S. E. 596.”

Counsel for appellants cite in support of their position, that possession in the plaintiff or proof that the lands are vacant and unoccupied, are necessary, the following cases:

Whitehead v. Shattuck, 138 U. S. 146; 34 Law Ed. 873;

Lawson v. U. S. Mining Co., 207 U. S. 1; 52 Law Ed. 65;

Whitehouse v. Jones (W. Va.), 12 L. R. A. (N. S.) 76 note;

Stockton v. O. S. L. R. Co., 170 Fed. 626.

These cases are all cases predicated upon statutes of different States in which it is provided that a suit in equity against defendant in possession of

real estate to quiet title and recover possession, or to remove a cloud, can not be maintained because the remedy by ejectment was plain and adequate. This rule of the common law and of equity has been set aside and changed by express statute of the State of Idaho. Section 4538 of the revised codes of Idaho in force since long prior to 1887, provides as follows:

“An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.”

In construing this statute, the Supreme Court of Idaho has held in the case of *Coleman v. Jaggers*, 12 Ida. 125, 85 Pac. 894, as follows:

“Anyone claiming some right or interest in land may maintain a suit to quiet his title under this section, although he has neither the possession or the legal title to said land. Thus, the holder of the equitable title may maintain a suit against the holder of the legal title.”

The above section of the Idaho statutes is identical with Section 738 of the Code of Civil Procedure of California, 1872, and practically identical with the same section of Deering's Code and Kerr's Code, and from an early day in California, the court has held in conformity with the decision of the above case cited from the Supreme Court of Idaho.

In the case of *People ex rel. Love v. Center*, 66 Calif. 551-6; 5 Pac. Rep. 263; 6 Pac. Rep. 481, the

Supreme Court of California has held under this section:

“One having legal title is not required to bring his action at law and then after recovery of possession, to file bill to quiet his title or possession against equitable claims asserted by defendant in ejectment, and to have such claims decreed to be invalid, but may secure both ends in one proceeding.”

In the case of *Darragh v. Wetter Manufacturing Co.*, 23 C. C. A. 609, and after an exhaustive consideration of the exact question involved in this case, viz., whether an enlargement of equitable rights by the statutes of the State may be administered by the Federal court as well as by the courts of the State, it is stated, citing from page 607:

“Upon a careful review of all these authorities and especially in view of the decisions in the last two cases to which we have adverted (*Gormley vs. Clark*, 134 U. S. 338, 10 Sup. Ct. 554; *Cowley vs. R. R. Co.*, 159 U. S. 569, 582, 16 Sup. Ct. 127), it may, we think with safety, be said that the following rule relative to the jurisdiction and powers of the Federal courts to enforce rights created and to administer remedies provided by State statutes for enforcement and administration in the courts of the state has been firmly established in the jurisprudence of the United States. Rights created or provided by the statutes of the States to be pursued in the State courts may be enforced and administered in the Federal courts, either at law, in equity or in admiralty, as the nature of the rights may require. *Ex parte McNeil*, 13 Wall. 236; *Cummins vs.*

Bank, 101 U. S. 153, 157; Trust Co. vs. Krumseig (May term 1896), 23 C. C. A. 1; 77 Fed. 32. An enlargement of equitable rights by the statutes of the States may be administered by the national courts as well as by the courts of the State. Case of Broderick's will, 21 Wall. 503, 520; Clark vs. Smith, 13 Pet. 195, 202; Holland vs. Challen, 101 U. S. 15, 25; 3 Sup. Ct. 495; Frost vs. Spitley, 121 U. S. 552, 557; 7 Sup. Ct. 1129; Reynolds vs. Bank, 112 U. S. 405; 5 Sup. Ct. 213; Chapman vs. Brewer, 114 U. S. 158, 170, 171; 5 Sup. Ct. 799; Gormley vs. Clark, 134 U. S. 338, 348, 349; 10 Sup. Ct. 554; Bardon vs. Improvement Co., 157 U. S. 327, 330; 15 Sup. Ct. 650; Cowley vs. R. R. Co., 159 U. S. 569, 583; 16 Sup. Ct. 127. 'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality.' Ex parte McNeil, 13 Wall. 236; Davis vs. Graves, 16 Wall. 203, 221; Cowley vs. R. R. Co., 159 U. S. 569, 583; 16 Sup. Ct. 127."

In the case of Devine v. Los Angeles, 202 U. S. 312, 50 Law Ed. p. 146, Chief Justice Fuller, delivering the opinion for the court, says, in construing Section 738 of the California Code of Civil Procedure:

"This statute enlarged the ancient jurisdiction of the courts of equity in respect to suits to quiet title but the equitable rights themselves remaining the enlargements thereof may be administered by the circuit courts of the United States as well as by the courts of the State."

Citing with approval, Broderick's Will, 21 Wall. 503; 22 Law Ed. 599; Holland v. Challen, 110 U.

S. 15; 28 Law Ed. 52; *Gormley v. Clark*, 134 U. S. 348; 33 Law Ed. 913.

In the case of *Moore v. Steinbach*, 127 U. S. 70-84, 32 Law Ed. 51 and 56, Justice Field, speaking for the court, holds as follows:

“As to the want of any allegation in the complaint of possession by the plaintiffs or any evidence of that fact in the proof, it is sufficient to say that by Section 738 of the Code of Civil Procedure of California, a plaintiff, though asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate or interest in the premises. *People vs. Center*, 66 Cal. 551. A statute of Nebraska, authorizing a similar suit by plaintiff out of possession was before this court for consideration in *Holland vs. Challen*, 110 U. S. 15 (28 Law Ed. 52), and the jurisdiction of a court of equity to grant the relief prayed in said case was sustained. See also *Reynolds vs. Crawfordsville First National Bank*, 112 U. S. 405, 411 (28 Law Ed. 733, 736; *Chapman vs. Brewer*, 114 U. S. 158, 170, 171 (29 Law Ed. 83, 87, 88); *U. S. vs. Wilson*, 118 U. S. 86, 89 (30 Law Ed. 110, 112); *Frost vs. Spitley*, 121 U. S. 552, 557 (30 Law Ed. 1010, 1012).”

The position of appellants as to surprise and such matters is wholly untenable, for the following reasons: that the allegations of the complaint are that the lands are wild and uncultivated lands; that appellants have admitted such fact and that the testimony so shows; that the statutes of the State of Idaho having extended the equitable powers of the court so as to eliminate the necessity of

possession, the courts of the United States will enforce such remedies in such State, as provided by statute and construed by the highest court of the State. Also that the legal title, as shown by the records, vesting in the appellant, Payette Lumber & Manufacturing Co., the interest of the appellee in said land was such an equitable interest that she had no plain, speedy and adequate remedy at law except by the cancellation of the instruments under which the appellants claim title.

APPELLANT COBBAN HAD NO AUTHORITY, EXPRESS OR IMPLIED, TO INSERT HIS OWN NAME IN BLANK POWERS OF ATTORNEY, OR TO CONVEY TO WEIRICK AS ATTORNEY-IN-FACT OF THE APPELLEE.

The appellants in their brief insist that the appellant, Cobban, had implied authority to fill in the blanks in the powers of attorney, predicated their contention upon a supposed agency of Benson for the appellee, but the record is wholly silent as to any agency of Benson for the appellee and appellants have wholly failed to point to any place in the record where any testimony was offered, tending to establish such agency, either directly or indirectly. The only person who was connected with the transaction as agent, either expressly or impliedly, for the appellee was Campbell and Benson was the purchaser or party dealing with the appellee through such agent.

The court says:

“If it be conceded that such authority need not be in writing, and that it need not even be expressly conferred, it still remains true that in some manner it must emanate from the grantor. It is not pretended that in the present case the plaintiff, in writing or otherwise, expressly authorized Cobban to act as her agent in this respect, and authority, if any there was, arose by implication alone. But from what fact or facts can the inference of such authority be legitimately drawn? Where a grantor receives the purchase price agreed upon and delivers a deed, otherwise complete, from these facts alone it may, not improperly, be inferred that he intended to authorize the purchaser to insert the name of the grantee in the blank left for that purpose. Such would be a natural inference. But the plaintiff here did not deliver these papers, nor did she receive the stipulated purchase price. They came into Cobban’s possession through the fraud of Benson, either actual or constructive, and without the knowledge or consent of the plaintiff, or of her agent, assuming that Campbell was her agent. She had never heard of Cobban, and, prior to the meeting at Campbell’s office, Benson had been a total stranger to her. The payment to, and the receipt by, Benson of the purchase money paid by Cobban gives rise to no implication. It is not the payment of the purchase money by the purchaser, but the receipt by the grantor, that tends to disclose the grantor’s intent. Benson had no authority to receive the purchase money for the plaintiff; he was not her agent, and probably never thought of the relation existing between himself and the plaintiff as that of agency.

“In his transactions with Cobban, he was the vendor, and in his relations with the plaintiff he was the vendee or purchaser. Certainly, it would be quite as reasonable to hold that he was the agent of Cobban to deliver the purchase money to the plaintiff as to hold that he was the agent of the plaintiff to receive it. My conclusion is that, when Cobban purchased these instruments, he took them at his peril. Upon their face, they appeared to be incomplete, and therefore inoperative, and to give them effect it was requisite that the name of a qualified person be inserted by some one authorized so to do. The authority was not conferred by the naked instruments themselves, and Cobban was bound to know that, unless it was evidenced by some writing or express declaration of the plaintiff, he must, if he would rely upon the power which the instruments purported to grant, establish facts from which it could legitimately be inferred. Such facts the record fails to disclose, and the instruments must therefore be held to be inoperative” (Transcript 510-511-512).

In the case of Tracey v. Withrow, 110 U. S. 119, 28 Law Ed. 90, the court says:

“The deed in blank passed no interest for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be and probably is the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party by parol to fill up the blank.”

Swartz v. Ballou, 47 Ia. 188;

Van Etta v. Evinson, 28 Wis. 33;

Field v. Stagg, 52 Mo. 534.

“As said by this court in *Drury vs. Foster*, 2 Wall. 33 (69 U. S. XVII, 781):

“‘Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient.’

“But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it. The blank must be filled by the party authorized to fill it and this must be done before or at the time of the delivery of the deed to the grantee. Allen, to whom it was stated the deed was handed, with authority to fill the blank and then deliver the deed, gave it to his wife without filling the blank, and she died with the blank unfilled.”

Counsel for appellants cited in support of their position 2nd Cyc. 160. A perusal of the citation will disclose that it refers only to negotiable instruments. At page 157, in 2nd Cyc., in discussing the alterations of deeds, it is said:

“If there has been a delivery, still the parties may consent to a change and redelivery, the new delivery constituting a re-execution, even without reacknowledgment, though it is also held that when the instrument is acknowledged before an officer appointed by law to take and certify the instrument, the parties have no right to make the most trifling change in it

without a redelivery and a reacknowledgment, the latter especially as against third persons.”

“Where the instrument has been actually delivered, it is held on the one hand that a redelivery will be necessary and a mere parol authority at this stage to make an alteration in the absence of the obligor or grantor is not sufficient. On the other hand, actual redelivery is not necessary but the circumstances may be sufficient to import the legal equivalent of such delivery, as where the change is made in the presence of the parties, or where the grantor, himself, carries the instrument to the proper office to be recorded; subsequent assent or ratification may be sufficient and where the party who makes the change is the agent of the obligor, it is considered that parol authority is sufficient because the authority thus conferred is not to execute a deed but to make it certain by an alteration or addition.”

The case of *Michigan Insurance Bank v. Eldred*, 9 Wall. (U. S. 54; 19 Law Ed. 763), is cited in support of this doctrine by appellants, but this case refers exclusively to negotiable instruments and of the completion thereof.

The evidence conclusively shows in this case that the appellee never intended to execute any powers of attorney to sell the selected lands, and the trial court finds with the appellee upon this point:

“There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney ‘to convey’ without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense,—whether the under-

standing was a transfer directly to Benson of the Monache lands or an exchange thereof with the government, and thereupon a transfer of the lieu lands to Benson or such person as Benson might designate,—according to all of the testimony, payment of the agreed price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title, from the plaintiff. Such is the testimony of the witnesses for the plaintiff, Campbell, in the most emphatic terms, so declares, and Benson, in effect, admits that such was the understanding. It is true, I think, that, when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that, having voluntarily attached her signature, she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly nor impliedly did she authorize their delivery to Benson. Campbell testifies that it was not his understanding that such instruments were ever to be executed, and that personally he was wholly unaware of their existence until after this suit was commenced. He never saw them, and did not deliver them to Benson or authorize their delivery. Benson ventures no explanation and advances no theory in justification of their delivery to him. In some way, it does not appear just how, they all reached his office bearing false notarial certificates of acknowledgment, and came from either Campbell's office or directly from the hands of the notary public. The delivery was made either by the notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertence, it was not in accordance with the original agreement, and had the au-

thorization or consent of neither Campbell nor the plaintiff."

"Where the execution of a deed is procured by deceit as when it is signed under the impression that it is a lease, it is a forgery and the question of good faith does not arise."

McGinn v. Tobey, 62 Mich. 252;

Camp v. Carpenter, 52 Mich. 375;

D'Wolf v. Hayden, 24 Ill. 525;

Griffiths v. Kellogg, 39 Wis. 293.

"Where a person never intended to sign a deed, and never knew that he had executed one, but in fact had signed without reading, under the apprehension that it was an entirely different instrument, the deed thus signed may be considered a forgery. Thus, where one who signed a deed believed it to be a duplicate of a lease of a part of the property described in the deed, which after a reading to and by him, he had signed, the lessee having placed two documents closely resembling each other upon the table to be signed, and there being a previous understanding that two copies of the lease should be signed, the court held the instrument to be a forgery and not the deed of the signer, and, also, that in a suit to set aside the deed, it being a forgery, the question of signing a supposed copy of the lease without reading it could not be considered. Where a title is founded upon a forged deed, it is not sufficient to examine the abstract simply, when the deed itself would have shown an alteration in its date, and when the grantor named in the forged deed was still in possession of the property."

Devlin on Deeds, Section 228;

McGinn v. Tobey, 62 Mich. 252 (4 Am. St. Rep. 848).

“A deed which has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent, does not, even as against a subsequent purchaser, without notice, transfer title.”

Gould v. Wise, 97 Cal. 532;

Fitzgerald v. Goff, 99 Ind. 28;

Henry v. Carson, 96 Ind. 412.

“A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent or acquiescence, is no more effectual to pass title to the supposed grantee, than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor in such cases, is whether he was guilty of negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons.

“The obtaining possession of an instrument by fraud, larceny, or any other means short of the performance of the condition is against the assent of the grantor, and as the assent is essential to delivery, and a delivery is essential to the validity of the deed, it is difficult to perceive how A ever obtained any title what-

ever to the premises, and, of course, equally difficult to perceive how he could convey any by any conveyance which he might execute to another. The recording of an escrow deed does not make it a deed. The legal title does not pass."

Everts v. Agnes, 65 Am. Dec. 314.

Cases are frequent where the defense of bona fide purchaser is set up in these instances. But they all depend, nevertheless, upon the fact that the party voluntarily parted with the property and executed and delivered the evidence of its alienation. Not so, however, in the case of a forged or stolen deed. In the latter case, there is no assent of the alleged grantor. There is no delivery.

In the case of *Arguello v. Bours et al.*, 67 Cal. 447 (8 Pac. 49), the Supreme Court of California says:

"A deed in which the name of the grantee is left blank by the grantor at the time of its execution and afterwards inserted without his authority, does not convey the title, nor does it become sufficient for the purpose of passing the title from the fact that the grantee entered into possession and paid the purchase price."

The evidence conclusively shows and upon this there is no dispute that the appellee did not acknowledge before any notary public any of the powers of attorney to convey the selected lands. Under the statutes of Idaho, acknowledgment was necessary before a deed executed by the attorney in fact could be recorded.

Section 3154, Revised Codes of Idaho, being identical with Section 2995, Revised Statutes of 1887, provides as follows:

“An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office.”

Section 2994, Revised Statutes of Idaho, 1887, provides as follows:

“Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof certified in the manner prescribed by chapter III of this title.”

These laws were in effect at the time of the recording said powers of attorney and at the time of the attempted deed under such powers. That the powers of attorney were blank at the time of their delivery as to the name of the grantee under the power is admitted by the defendants.

In the case of *Drury v. Foster*, 2 Wall. 24 (17 Law Ed. 780), involving the validity of a mortgage signed and acknowledged by the wife, but blank as to the mortgagee and the amount of the mortgage, and delivered to the husband who afterwards filled in the name of the mortgagee and the amount of the mortgage, the Supreme Court of the United States says:

“Now, it is conceded, in this case, that the instrument of Mrs. Foster, signed and acknowl-

edged, was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. If she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted. Although it was at one time doubted whether a parol was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient. But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, *there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged.* The act of the feme covert and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.”

In this case, the court will notice that the evidence shows that all of the acknowledgments of the alleged powers of attorney were dated prior to their delivery to the defendant, Cobban, and we contend that, not being complete at the time of delivery, that the powers of attorney were, as well said by the United States Court in the case just cited, mere waste paper.

The position of the appellant, Cobban, is solely based upon an implied authority to fill in his own name in the powers of attorney, to be implied from the mere fact of their delivery to him. These powers all relate to the conveyance of real property and the same rule would be applicable to such instruments as would apply to a deed executed under like circumstances and conditions. The power of attorney to convey real property must be complete at the time of its delivery or there must be in contemplation of the party at the time of the execution thereof some person to whom the power shall be granted. Cobban was not known to the appellee at the time of the signing of the powers of attorney and his name was not mentioned to her as a possible or probable grantee of the power, so she could not have contemplated that his name would be filled in as grantee.

“Where a person signs a deed and acknowledges the same, leaving the grantee’s name blank and afterward it is filled in with a name which the grantee did not authorize, the deed is void.”

Burke v. Bours et al., 92 Calif. 112 (28 Pac. 57);

Arguello v. Bours, 67 Calif. 450.

Again, in the case of *Vaca Valley R. Co. v. Mansfield*, 84 Cal. 561; 24 Pac. 145, the Supreme Court of the State of California says:

“A deed signed in blank and afterwards filled in without authority and certified is forgery, absolutely void and ineffectual to convey any title as if it were an entire forgery.”

It is apparent from the record that all of the dealings of the appellant, Cobban, with Benson, were made pursuant to and carrying out a previous agreement between himself and the appellant, Weirick, and others, representing the syndicate, whereby Cobban became the agent for the syndicate under an express agreement; that all lands purchased by him should be conveyed to the appellant, Weirick, as trustee for the syndicate. The appellants concede that Cobban acted entirely within the scope of his authority as such agent and the agency is expressly alleged and admitted in the joint answer of appellants Cobban and Weirick, and under the well established law of agency, the act of Cobban became the act of Weirick and their associates and they became bound by his acts and are chargeable directly with notice of any act of his in connection with the insertion of names in the blank powers and the conveyance to Weirick, as trustee, being in pursuance of a prior agreement would charge Weirick and his associates with notice of all defects. Appellants by their brief contend for some doctrine, seeking to avoid the acts of Cobban in inserting the name in the blank powers whereby they would invest the rights of the appellee in the base lands and the power to convey the selected lands upon a par with personal property.

In the case of *Puget Mill Co. v. Brown et al.*, 54 Fed. 987, a case involving the purchase and sale of so called "scrip", at page 993 the court says:

“Now, by the agreed statement of facts before me it appears that the complainant did not deal directly with Susan King; and, giving to its officers and agents credit for the sagacity and prudence of business men of ordinary intelligence, there appears to be no theory consistent with the facts which can lead to a conclusion that there was any bona fide attempt to transfer any right to the land which the parties could reasonably have supposed to have been acquired by the additional homestead entry. An attempt to convey a title cannot be bona fide on the part of the vendee unless in making the purchase he acts with reasonable prudence, and under an honest belief that the vendor has the right to convey the title to him. Now, I find annexed to the statement of facts the original instrument, purporting to be a power of attorney from Susan King to W. D. Scott, under which the deed to plaintiff was executed by Scott. By the date of its execution and acknowledgment, in connection with the admitted fact that the complainant’s bargain was for ‘Scrip’ (so called)) and that it paid the purchase money to a stranger, and the further fact that upon the present trial the complainant has not offered to prove that the so called ‘scrip’ which it bargained for was different in character from the sets of blanks which were commonly sold and traded in by dealers, and by them called ‘Soldier’s Additional Homestead Scrip,’ the inference is justified that the complainant, at the time of its purchase, either knew, or ought to have known, that said power of attorney either divested the maker of it of all her beneficial interest in the land some four months prior to the additional entry in the land office at Olympia, and therefore falsified the statements of the application and affidavits whereby the entry was made, or that, at the

time when it left the possession and control of its maker, said power of attorney was a mere blank, utterly void, and that by subsequently filling the blanks, so as to make it appear to be complete and valid, a forgery was committed."

The doctrine contended for by counsel for appellants is based solely upon two erroneous propositions: First, The same rules are applied to alteration of an instrument affecting title to real estate as are applied to negotiable instruments and stock of corporations. To which there can be no parallel either in law or fact, when considering the alteration of an instrument relating to the sale and transfer of real property. Second, for an incompleted deed or instrument delivered to an agent or other person with express power to complete the instrument. In this case, four elements found in all cases are lacking. First, Benson was not and did not claim to be the agent for the appellee. Second, the appellee did not knowingly or intentionally execute or sign the powers of attorney, and third, the powers of attorney, as found by the trial court, were never delivered to Benson, and fourth, there is no evidence or circumstances surrounding the execution of the powers of attorney from which the authority to fill blanks could be implied. Neither is there any such authority implied from the delivery, for the court finds that there was no delivery. It is conceded that the statutes authorizing the surrender of the base land and the selection of the lieu lands were such that the lieu lands must be selected in the

name of the person who surrendered the base lands. Hence, there is no law, authorizing the assignment of this right.

Another element which is essential in any case where possession of a deed or instrument executed in blank is to be construed as giving implied authority to complete the same, is that it must have been entrusted by the owner to the possession of the person from whom it was obtained.

In this case, the evidence shows and the court has found that the powers were never delivered by either the appellee or Campbell to Benson. And all the elements necessary from which to imply authority to fill in the powers are wholly lacking.

APPELLANT, THE PAYETTE LUMBER AND MANUFACTURING COMPANY, DID NOT TAKE THE LEGAL TITLE AS A BONA FIDE PURCHASER WITHOUT NOTICE.

The record shows that the appellant, Payette Lumber and Manufacturing Company, received a deed for the property involved in this action by deed, Defendant's Exhibit "A", dated May 19, 1903.

The record shows that the appellant, Payette Lumber and Manufacturing Company, receiving a deed from a grantor designated as trustee, made no inquiry as to the name or interests or the persons for whom Weirick was acting as trustee or the nature of the trust under which he held title. At the time of the execution and delivery of said deed,

the revocation of the power of attorney executed by the appellee on January 3, 1903, and recorded January 16, 1903, in Boise County, Idaho (Complainant's Exhibit "T", Transcript 503) was a part of the records of the county in which said property was situated and certainly the duty was incumbent upon the purchaser to make an examination of the records and of all instruments affecting the title up to the date of the purchase. The addition of the word "Trustee" to the name of Weirick in the deed executed by Cobban as purported attorney in fact for Mollie Conklin and the Reddy Estate imposed upon the Payette Lumber and Manufacturing Company the duty of making some inquiry and investigation as to the nature and character of the trust. This is especially true, in view of the fact that the deed tendered by Weirick as grantor and conveying the property also designated Weirick as trustee.

The appellants, Cobban and Weirick, admit that the powers of attorney came into their hands incomplete, and a paper not showing any vested right. Such being the case, it appears to us that the filling in of the name of R. M. Cobban was a plain act of forgery.

Appellants having admitted the terms and conditions of a previous agreement under and by the terms of which the pretended powers of attorney were secured and the conveyance made, and that such conveyance was made in pursuance of said agreement and in consideration of money paid on

the order of Cobban from time to time, the conveyance by Cobban would pass the title to E. B. Weirick, as trustee, subject to all equities and claims of the complainant, Mollie Conklin, and the appellant, E. B. Weirick, trustee, could not and does not attempt in this case to plead that he was a bona fide purchaser of the land under the deed from Mollie Conklin and others, by the hands of R. M. Cobban, their attorney in fact, and the mere knowledge that R. M. Cobban, acting as the agent of Mollie Conklin, deeded to a trustee, creating a trust in favor of himself, would certainly bring home to the grantee of such deed full notice of all claims of the complainant and the law will not permit an agent to deal with the property of his principal and create an estate therein in favor of himself without showing that his actions were in the whole fair and free from any taint or suspicion of fraud, and certainly the parties associated with him in this fraud can not clothe themselves with the equitable protection of a bona fide purchaser.

“The addition of the word ‘trustee’ to the name of a person is notice of a trust and calls for inquiry and examination.”

Mayberry v. Ehlen, 20 Am. St. Rep. 467;

Mer. Nat. Bank v. Parsons, 40 Am. St. Rep. 299.

Where the word “trustee” is inserted in a deed to land after the name of the grantee, and in a subsequent contract relating to the sale of the land, he

affixed the word "trustee", such word is not merely descripto persona, but it indicates that the grantee takes the title, not in his individual capacity, but in trust for another not disclosed, and parol testimony is admissible to show for whom and for what purpose he was constituted trustee.

Johnson v. Calman, 41 Am. St. Rep. 284.

In the deed under which the defendant, Payette Lumber & Manufacturing Company, holds, the grantor is designated as "E. B. Weirick, trustee."

In the case of Mercantile National Bank v. Parsons, 40 Am. St. Rep. 299; also cited at page 202, the Supreme Court of Minnesota says:

"It is a settled doctrine that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title and while the word 'trustee' in a deed gives no notice of the name of the beneficiary or of the character of the trust, yet it does give notice of a trust of some description which imposes the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led."

Again, in the same case, the court says:

"As the deed gave no indication as to who the possible beneficiary was, the only person to whom inquiry could or would naturally be made were the grantor and the grantee. If Fletcher, the grantor, had been inquired of, presumably the market company would have been informed, as the facts were, that the consideration was paid by the farming company, and at its di-

rection the deed made to Crowell. There is nothing, however, to suggest that Fletcher knew of the subsequent declaration of trust by Crowell in favor of Parsons and Handy. The other person of whom inquiry could be made was Crowell, who made a statement of the situation, which, especially, in view of the fact that the farming company had paid the consideration for the property, was reasonable and natural, and one upon which a prudent man would have been justified in acting without inquiry whether possibly some one other than the farming company might not be the beneficiary."

Had the defendant Payette Lumber and Manufacturing Company made inquiry of Weirick, he would have informed it that Cobban was a beneficiary, and they would have discovered that Cobban acting in a fiduciary capacity had created a trust in himself in his principal's property, then it would have been its duty to enquire of Mollie Conklin and it would have discovered all.

Having failed to make any inquiry, it is presumed under the law that everything which an inquiry would have brought to the knowledge of the purchaser is chargeable to him. The record title to the property in question, as presented to the Payette Lumber & Manufacturing Company, discloses the following facts:

That a conveyance from Mollie Conklin and the Reddys, executed by R. M. Cobban as attorney in fact, had been made to E. B. Weirick, trustee, and that E. B. Weirick, trustee, was conveying the prop-

erty to the Payette Lumber & Manufacturing Company. A reasonably prudent man, and the law presumes that the Payette Lumber & Manufacturing Company is such, would have made a reasonable inquiry, as suggested in the foregoing case and such inquiry would naturally have been made of the grantors, Mollie Conklin and the Reddy Estate and of E. B. Weirick, trustee. This inquiry was not made (Transcript 250). Also there was before the Payette Lumber & Manufacturing Company at the time of accepting said deed, the revocation of the powers of attorney filed by the appellee in the recorder's office of Boise County.

Under the facts in this case, the Payette Lumber & Manufacturing Company cannot acquire any better title than that held by their grantor, E. B. Weirick, trustee.

“Not only will an alteration vitiate the instrument as between the immediate parties, but also as against a bona fide holder or endorser without notice, as the latter can acquire no right or title other than that of the person under whom he claims.”

Pelton v. San Jacinto L. Co., 113 Cal. 21 (45 Pac. 12).

“The general doctrine, indeed, is that notice is not binding, unless it proceed from a person interested in the property, and in the course of a treaty for its purchase. But this rule applies to notice only in its limited sense, as distinguished from knowledge or such information as is substantially equivalent to knowledge. If it be shown that a purchaser knew, or was in-

formed of the existence of a fact tending to impeach or cut down the title of his vendor, it is immaterial whether his knowledge was obtained from parties in interest, or third persons. From whatever quarter it may proceed, it will be sufficient, if it be so definite as to enable the purchaser to ascertain whether it is authentic or not, and sufficiently clear and definite to put him on inquiry, and to conduct that inquiry to an ascertainment of the fact."

Bigelow on Equity, Chap. XI, page 182,
Sec. 1.

"Another ground for relief in equity (and the relief is applied almost as frequently in courts of law) is found in the doctrine of notice. A purchaser of property, with notice that the title of the vendor is liable to be disputed for fraud, or other infirmity, is entitled to no consideration at law or in equity, if the fraud or other infirmity be established. He stands in ordinary cases, in the precise position of the vendor himself."

Bigelow on Equity, Chap. II, Sec. 1.

Defendants admit that not a single one of them made any inquiry regarding these instruments, of any person whomsoever,—they have pleaded, and at all times allege and contend that they were purchasing *the right to select*. A right to select is an equity, therefore they stand in no position to plead that they were bona fide purchasers.

The documents which they received demonstrated that the parties therein designated as grantors had no right to convey, because: In the Reddy interest the order of the probate court in California, upon

its face, showed that such order was not being complied with, admitting that it was valid, while, if they had investigated the abstract as to the Mollie Conklin interest, they would have ascertained that a portion of the base lands involving Mollie Conklin's interest had not been probated.

Cobban testified that he had no authority from Mollie Conklin to fill in blanks in the alleged powers of attorney. When asked if the complainant Mollie Conklin had authorized him to fill blanks, he replied, "Only in a general way as her agent", and, when told that he was being asked specifically, he stated: "Not from Mollie Conklin personally" (Transcript 270).

He *considered* he had authority.

He *assumed* from the fact that the papers were delivered to him for a consideration, that he had a right to make such insertions as he saw fit (Transcript 271).

We ask of counsel: "What is it that Mollie Conklin did to enable any wrong to be committed against these defendants?" "What act of negligence is she guilty of?"

Appellants allege but two answers: The signing. The delivery.

As to the signing (if it be Mollie Conklin's signature): It did not injure them, and did not deceive them, for they, without exception, admit they did

not know her signature, and did not rely upon it. Therefore they were not misled by it.

As to an alleged delivery: The testimony of their own witnesses is that no such instrument as a power of attorney to convey was agreed upon and no delivery was authorized. Mollie Conklin cannot be held because these alleged powers were procured without her knowledge or consent.

In this case, the defendant, Payette Lumber & Manufacturing Company claims that they purchased the property from Weirick and that Weirick's title came through the use of the powers of attorney from Benson. This could not constitute them a bona fide purchaser from Mollie Conklin.

In the case of Puget Mill Co. v. Brown, reported in the 7 C. C. A., page 643, the court holds that a purchaser from a person claiming to represent the person making the homestead entry is not a bona fide purchaser from the latter, and in this case the title coming through Benson, they can not claim to be a bona fide purchaser from Mollie Conklin.

“The doctrine of bona fide purchaser without notice, does not apply when there is a total absence of title in the vendor. The good faith of a purchaser can not create a title where none exists.”

Dodge v. Briggs, 27 Fed. Rep. 160.

“To the application of this doctrine of a bona fide purchaser there must be a genuine instrument, having a legal existence, as well as one appearing on its face to pass title. It can not

arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

Hyde v. Shinn, 199 U. S. 83.

"Where a party in his plea or answer desired to claim that he was a bona fide purchaser for a valuable consideration, he should state the deed of purchase, with the date, parties and contents briefly; that the vendor was seized in fee and in possession; the consideration with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed; and how the grantor acquired title. Notice should be denied previous to and down to the time of paying the money, and the delivery of the deed."

Boone v. Childs, 10 Peters 193.

"In a plea of purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver that the person who conveyed was seized, or pretended to be seized, at the time when he executed the purchase deeds."

Flagg v. Mann, 2 Summ. 486, 557.

"It must be by a regular conveyance; for a purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity."

Boone v. Childs, 10 Peters 211.

In an opinion by Chief Justice Marshall in the case of *Hunt v. Rousmainer*, 8 Wheat. page 174, citing from page 204, it is held:

"As this proposition is laid down too positively in the books to be controverted, it be-

comes necessary to inquire what is meant by the expression, 'a power coupled with an interest'. Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import the meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him."

Then to hold that in this case, the power of attorney made by its terms irrevocable, would vest title in the holder of the power, it would be to say

that the power of attorney was in effect a deed. It certainly is not in form a contract for real estate and does not, on its face, give to R. M. Cobban, or to the persons claiming under the power, an interest in the property itself.

As said by the Supreme Court of the State of California, in the case of *Freeman v. Rahm*, 58 Cal. 115:

“The power of attorney did not purport to be, and was not a transfer of the title—(party paid for and took irrevocable power of attorney)—Any act that plaintiff might have performed under it would have been as attorney-in-fact of Campbell, not as grantee. There was no instrument in writing by which any sale, or contract of sale, or declaration of trust, was evidenced.”

To so hold, would be to hold that the evidence of title to real estate could become in effect personal property and pass by mere delivery. This rule, so far as we can find, has never been applied to real property and as applied to mercantile paper in the case of *Chauncey v. Arnold*, 24 N. Y. 330, the court says:

“A paper intended to operate as a mortgage cannot be delivered and put in circulation with blanks to be filled, limiting the doctrine permitting such practice to mercantile paper.”

There is another reason which prevents appellant, Payette Lumber & Manufacturing Company, from claiming as a bona fide purchaser without notice in

this case, viz., the patents issued by the United States for the land involved in this case were all executed to the appellee, Mollie Conklin, and to Emily M. Reddy, executrix of the estate of Patrick Reddy, deceased and Edward A. Reddy, administrator of the estate of Patrick Reddy, deceased. It is shown by the record that there was no administration in the State of Idaho of the estate of Patrick Reddy, deceased, and yet the powers of attorney under which Cobban presumed to act were those executed by the administratrix and administrator of said estate.

The law is well settled and needs no citation of authority that an administrator or administratrix can only sell real estate in the manner provided by law and by order of a court of competent jurisdiction, and certainly, it can not be claimed that authority could be expressed or implied for such persons to execute a power of attorney. Upon the face of the record, as presented to the Payette Lumber & Manufacturing Company, their title was wholly wanting, as to an undivided one-half interest in this land.

Hence, by taking the title that apparently on its face was to be a fee simple title to the entire estate and the notice that the estate was liable to be cut down by failure of the title secured from the administrator and administratrix of the Reddy Estate, they could not be bona fide purchasers.

THE REVOCATION OF THE POWERS OF ATTORNEY.

By the provision of Section 3162 of the Idaho codes:

“No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.”

In this case, the revocation of the powers of attorney was duly acknowledged and duly recorded and being of record at the time when the appellant, Payette Lumber & Manufacturing Company accepted their conveyance, taken in connection with the use of the word “trustee” in the deeds to and from Weirick, was amply sufficient to put the appellant, Payette Lumber & Manufacturing Company, upon notice.

Counsel for appellants contend in their brief that the representatives of the Reddy Estate received \$10,400 from Benson after notice of the existence of these powers of attorney and notice of all the facts in connection with the exchange of land. This statement is not borne out by the record. Campbell, the attorney for the representatives of the Reddy Estate, testified that he never knew of the existence of such powers until the time of the taking of his deposition in this case, and further, that he was led to believe by Benson that the money

paid to the estate was *advanced* by Benson in advance of any sales and was not the proceeds of the sale of any property.

AN UNAUTHORIZED DELIVERY OF PAPERS BY A SPECIAL AGENT OR ESCROW DEPOSITARY DOES NOT BIND THE PRINCIPAL, EVEN IN FAVOR OF THE SUBSEQUENT PURCHASER WITHOUT NOTICE.

The court found that the papers to be executed by the appellee and the representatives of the Reddy Estate were not to pass out of the control of the appellee except upon payment of the purchase price in full, and the court further found that by the terms of the sale as agreed upon between the appellee and Benson, in the presence of Campbell, Benson was to draft the papers and after their execution, they were to be deposited by Campbell in escrow at the Anglo-Californian Bank, with instructions to deliver to Benson upon receipt of the stipulated price (Transcript 512-513), and that Campbell's connection with said transaction was in the nature of a special agency.

The character of Campbell's agency is clearly defined by the testimony in the record and is specifically found by the court and the appellants did not attempt to introduce any evidence to change or vary the terms of such agency.

In *Schimmelpennich v. Bayard*, 1st Peter 264, 7th Law Ed. 138, the court says:

“It is believed to be a general rule that an agent with limited power can not bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority.”

As applied to the conveyance of real property and papers in connection therewith, the rule is universally held that the unauthorized delivery of an escrow deed does not operate to effect a transfer of title.

In 16th Cyc. 581, the rule is laid down and the great weight of authority sustains the view

“that an unauthorized delivery of the instrument conveys no title or gives no right, even in favor of an innocent subvendee without notice of the conditions or event stipulated in the escrow contract and the authorities are very strong where the escrow has been obtained or delivered through fraud. The principle upon which the doctrine rests is that an instrument delivered in violation of the terms by which it has been placed as an escrow is not in fact delivered and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument. Some authorities proceed upon the theory that a depositary is a special agent of the depositor and, therefore, his powers being limited, to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers.”

To the same effect and holding the same rule are *Skinner v. Baker*, 39 Ill. 496; *Berry v. Anderson*, 22 Md. 36; *Harkreader v. Clayton*, 56 Miss. 383; 31

Am. Reps. 369; *Tyler v. Cate*, 29 Ore. 515-525; 45 Pac. 800; *Patrick v. McCormick*, 10 Neb. 1; 4 N. W. 312; *Black v. Shreve*, 13 N. J. Eq. 455; *Smith v. South Royalton Bank*, 32 Fed. 341; 76 Am. Decs. 179; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Reps. 1; *Balfour v. Hopkins*, 93 Fed. 564; 35 C. C. A. 445.

In the case of *Provident L. etc. Co. v. Mercer Co.*, 170 U. S. 593 and 604; 42 Law Ed. 1156, the court distinguishes between the case of a bona fide purchaser of negotiable paper which had been wrongfully delivered by a depositary and that of purchaser of real estate under like conditions and the court quotes with approval the following language used in *Fearing v. Clark*, 16 Gray (Mass.) 74; 77 Am. Decs. 394:

“The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until after a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was entrusted, but the law aims to secure the free and unrestricted circulation of negotiable paper and to protect the rights of persons taking it bona fide without notice.”

In *Devlin on Deeds*, 3rd Ed., Sec. 322, the rule is laid down as follows:

“Until the condition has been performed and the deed delivered over, the title does not pass but remains in the grantor. If the condition is not performed, the grantee, we have seen, is

not entitled to the deed. If the depositary delivers the deed without authority to do so from the grantor or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title, either to the grantee or purchasers under him."

In the case of *Balfour v. Hopkins*, 93 Fed. 564; 35 C. C. A. 445, in commenting upon this rule, the court says:

"The authorities are not in entire harmony as to the effect of the delivery of a deed which has been left in escrow to be delivered to the grantee upon the performance of a condition and which has been wrongfully delivered before the condition was performed. The decided weight of authority seems to sustain the view that such a delivery is inoperative to convey title, even in favor of an innocent purchaser without notice, unless the grantor has by some act or conduct of his own estopped himself to deny the delivery."

In the consideration of *Calhoun v. American Emigrant Co.*, 93 U. S. 124; 23 Law Ed. 826, it was said:

"Beyond doubt, the deed of the lands was delivered to the clerk of the respondent as an escrow and subject to the conditions that it should not be delivered to the grantees until they gave a mortgage to secure the full performance of the agreement under which the deed was executed. But it is equally clear that the condition required to be fulfilled before the delivery could be made was never performed and the rule is established by repeated decisions

that where a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed."

The following cases also bear out the rule:

Knapp v. Nelson, 41 Colo. 447; 92 Pac. 912;

Tyler v. Cate, 29 Ore. 515; 45 Pac. 800;

Bradford v. Durham, 45 Ore. 1; 101 Pac.

897; 135 Am. St. Repts. 807;

Powers v. Rude, 14 Okla. 381; 79 Pac. 89;

Bowers v. Cottrell, 15 Ida. 221; 96 Pac. 936.

It is clear in this case that the powers of attorney to sell the lands involved were never delivered by either the appellee or by her agent, Campbell, to Benson and the court finds (Transcript 516):

"In the third place, whatever may have been Campbell's authority, he did not knowingly deliver the instruments. In some unexplained manner, they came into Benson's possession, without Campbell's knowledge or consent. Campbell's positive disclaimer of knowledge is corroborated by the facts and circumstances of the case. It is wholly improbable that experienced lawyer that he was, he would, knowingly, authorize or acquiesce in the course pursued in this case, and thus needlessly jeopardize the interests of his clients. Whether Benson procured the papers by deception or through the inadvertence of the clerks in Campbell's office, his acceptance and use of them constituted a fraud upon the plaintiff's rights. There was no legal delivery of the instruments, either by the plaintiff or by her agent."

The whole record discloses and the court has found that the appellee never knowingly executed

or parted with possession of the powers of attorney to sell the selected lands; that they were not involved in and were no part of the papers which it was understood should be executed in connection with the lands, so that the case at bar is not one where the appellee could be charged with knowingly and voluntarily parting with possession of the instruments or submitting them to the care of any person, and under the overwhelming weight of authority, a title acquired by the means which the appellants have alleged in this case and under the facts as found by the court,—no title could be acquired by such instruments.

Counsel for appellants insist that the appellee is not required under the decree to do equity before she could recover. The court has found that by paying the amount that the appellee should have received under her contract with Benson, with interest from the date of the filing of the revocation of the powers of attorney, to-wit, January 16, 1903, at seven per cent., that the appellants may secure title. The record is wholly silent as to any evidence showing that the appellants or either of them have at any time, or at all, paid any taxes levied against the lands, or been to any expense, which the appellee claims in this action. Neither is there any showing of any protection against fire or other depredation, or that the value of the lands has been enhanced. These matters were such that the appellants should have made the same an issue on the trial of the case, and not in a brief.

As to the contention that the appellants are innocent in fact and in law, the appellants proceed wholly upon the theory of an alleged secret limitation on Benson's agency which they contend was "wholly inconsistent with the apparent authority with which he was clothed". This position is wholly unwarranted by the evidence or by any facts in evidence. The only circumstances under which the appellants can justify this position is the mere delivery of the instruments to them by Benson. The evidence taken by the appellants, to-wit, the evidence of Campbell and Benson, shows that in the dealings with the appellee Benson was the purchaser, and there is no testimony, direct or indirect, to show that Benson or any other person ever was vested with any powers, duties or agencies on behalf of the appellee. Neither is it shown that Benson ever pretended to act as the agent, special or general, with any powers or authorities to bind the appellee. As to the appellants and each of them, the record affirmatively discloses that no inquiry was made to ascertain or determine from Benson or from any other person the extent of the authority claimed by Benson, nor to investigate or determine whether or not he was the agent of the appellee, but they have testified and the court has found that they recklessly accepted incomplete instruments, to-wit, powers of attorney to convey real property, incomplete in form and on their face apparently acknowledged before an officer qualified to take and certify acknowledgments to instruments affecting

real property and without inquiry or investigation, recklessly inserted, or caused to be inserted the name of R. M. Cobban in such instruments and placed the same of record in Boise County, Idaho, to become a part and parcel of the chain of title to the lands involved, and we insist that under all the facts and circumstances, the record discloses, that the appellants have proceeded recklessly and without due investigation to ascertain the true facts, circumstances and conditions surrounding their attempted purchase of these lands from the appellee.

As to the question of laches, the same is wholly without merit. The record fully discloses the efforts made by the appellee to ascertain and determine the conditions of this property after she became cognizant of the acts of Benson. Within a month after she ascertained that any powers of attorney were being used in Boise County, Idaho, she filed a revocation in general terms of all powers of attorney and caused the same to be recorded in said county. Her suit was commenced within the time provided by the statutes of the State of Idaho and as to the contention that most of the witnesses who were familiar with the facts were dead prior to the commencement of said action, the same is wholly unwarranted because of all the parties interested, the only other person shown to have been present at the time of the alleged deal was Emily M. Reddy and the record is silent as to the time of Emily M. Reddy's death.

As to the maxim, "He who trusts most, ought to suffer most", we earnestly insist that the maxim is purely applicable to the case of the appellants. Under the facts and circumstances as proved in evidence, and as expressly alleged by appellants, Cobban and Weirick, they accepted the papers in the condition in which they both allege and prove they did accept them. They certainly were imposing in Benson, a degree of trust wholly unwarranted by any facts or circumstances, and there is no evidence to show that the appellee placed any trust or confidence in him in any manner or at all, and the appellants should certainly be made to suffer if anyone must suffer rather than that the burden should be placed upon the appellee.

Respectfully submitted,

N. E. CONKLIN,
Berkeley, California.

WM. B. DAVIDSON,
Boise, Idaho.

Solicitors for Appellee.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

R. M. COBBAN, E. B. WEIRICK, Individually
and also as Trustee, and THE PAYETTE
LUMBER AND MANUFACTURING COM-
PANY, a Corporation,

Appellants,

vs.

MOLLIE CONKLIN,

Appellee.

REPLY BRIEF OF APPELLANTS.

STATEMENT.

Counsel for appellee have presented a lengthy statement of facts in their brief which requires certain corrections and modifications. It is asserted at page 3 that the Conklin Estate was in the course of probate at all times during the year 1900, and at page 6, that Mr. J. C. Campbell was appellee's attorney at this time.

We do not consider these facts very material to the issues in this case, but wish to point out that these assertions are flatly contradicted by the record. The final decree in the Conklin Estate was signed December 1st, 1899, and filed February 16, 1900 (Complainant's Ex. "A," not printed in the record). The amended decree (Complainant's Ex. "V," Trans. 464) was filed a year after the transactions involved in this case, and the trial court found that Campbell was not appellee's attorney in any sense (Trans. 493); but even if he was her attorney, this would merely charge appellee, who trusted him, with the consequences of his acts as against appellants, who did not even know of his existence.

At page 5, Mr. Campbell is said to have testified that "by the agreement, the titles to the *selected* lands were to be approved in the names of the appellee and the Reddy Estate, and when so approved, that Mr. Benson would have the right to purchase the same at \$3.80 per acre." But the only title that was to be approved by the Government was the title of appellee and the Reddy Estate to the base or Monache lands (Trans. 323, 338), and this title would not and could not be passed upon until the lieu selections were made. Until the United States Government had approved the titles to the base lands and thus accepted the lieu selections, the grantors could not lose control over the base land, and as soon as these titles were approved, they were entitled to their money under the agreement. The delay in the approvals was certainly due to no fault of Mr. Benson, but was caused by the state of the Monache titles, the *lis pendens* in the Broder case, and by the machinations of appellee. Mr. Campbell did testify that Mr. Benson did not have the money to pay for all the Monache lands, and that it was understood that he should sell the right to select, or the selected lands (Trans. 351, 352).

Mr. Benson's testimony that the powers of attorney to convey were discussed and understood by the parties was strongly corroborated (see page 6 of appellants' brief). Appellee contends that the acknowledgments on these powers of attorney were false and fraudulent, and relies upon oral testimony given ten years after the date of the acknowledg-

ments to the effect that she resided in Bakersfield, California, from December, 1900, to some time in the summer of 1901, to impeach the notary's certificates. The trial court held the question of the truth or falsity of these certificates wholly immaterial (Trans. 498). But assuming the point to be material, the assertion is not warranted by the record. Three of these powers of attorney (Complainant's Ex. "D," "K" and "L") were executed before Holland Smith in September, 1900, before appellee left San Francisco, and the correctness of these certificates is strongly corroborated by the evidence (Trans. 339-341). Complainant's Exhibits "C" and "M" were acknowledged after appellee had returned to San Francisco, while the balance of the powers of attorney were acknowledged about the first of March, 1901, and appellee's evidence is consistent with a visit to San Francisco at about this time.

R. M. Cobban, personally, was not a member of the syndicate for which appellant Weirick acted as trustee, as stated on page 7 of appellee's brief, but the R. M. Cobban Realty Company, a corporation, was a member of the syndicate, and appellant Cobban was one of the stockholders in this corporation (Trans. 244, 251, 257, 271, 272). Mr. Cobban was only benefited by the deal because of his interest in this corporation.

At page 9 of appellee's brief, counsel refer to appellant Cobban's testimony as to his authority to fill blanks in the powers of attorney. Appellant Cobban testified squarely that he had no express authority, written or oral, from Mollie Conklin personally to

fill these blanks, but that he had bought and paid for the scrip, and that it would have been utterly worthless unless he had authority to insert his name as agent. And under the authorities cited in appellants' brief (pp. 49-68), he was clearly justified in assuming that he had an implied authority to insert his own name and address. This was the only addition to the powers of attorney that was made or that needed to be made, and counsel's construction of Mr. Cobban's evidence is clearly unjustified.

The evidence of N. E. Conklin shows clearly that he had actual knowledge, as attorney and agent of appellee, as early as July, 1902, that powers of attorney to convey lands selected in lieu of the Monache lands were in existence, that such lieu lands had been selected in Boise County, Idaho, and that R. M. Cobban held powers of attorney of some sort (Trans. 214, 215, 224-226, 238). Furthermore, all the Cobban powers of attorney had been recorded in Boise County in 1901 and appellee was certainly charged with notice that such powers were on record, at least from and after July, 1902, when she learned of the selections in that county (see pp. 10, 11 of appellants' brief).

Appellee claims Mr. Benson perpetrated an actual fraud upon her, and cites the letter of December 11, 1901 (Trans., pp. 476-478). This letter is discussed at pages 26 to 29 of appellants' brief. In addition to the facts there stated it should be noted that under the agreement the money was not to be paid over until the titles to the Monache lands were approved by the Government (Trans. 323, 337-338, 351, 357,

386). But Benson advanced \$2,750 to appellee and over \$13,000 to the Reddy Estate before a single title was approved, and the reason no more money was advanced to appellee was because she had notified Campbell or Benson, or both of them, that she would not accept it (Trans., pp. 348, 349, 447, 448). And this was long before the letter, known as Complainant's Ex. "U-1," referred to in appellee's brief at page 12. It is also shown that at some time, the date of which is not fixed, appellee declined Benson's offer to make up all sums due on account of land, the titles to which had been approved, if appellee and the Reddys would ratify the transfers and give direct deeds (Trans. 361-363).

ARGUMENT.

Complainant cannot Found Her Bill Solely on the Ground of Fraud and Conspiracy and Recover on Some Inferior Ground of Relief Incidentally Set Up in the Bill.

Pages 32 to 48 of appellants' brief were devoted to a discussion of the above heading, and appellee attempts to answer this discussion by claiming that "fraud and conspiracy are mere incidents to the allegations of the facts in said cause." The authorities cited to support this contention are wholly inapplicable.

The quotation of 16 Cyc. 483 is qualified by the quotations at pages 485 and 486, quoted on page 34 of appellants' brief. The statement of Daniell on Chancery Practice, page 382, and the case of Williams vs. United States, 138 U. S. 514, both apply to cases of a bill with a double aspect; that is, to cases where distinct acts of fraud were alleged and facts showing mistake and inadvertence were set up wholly

independent of the allegations of fraud, and in the Williams case the Circuit Court had expressly found that fraud existed, whereas in the case at bar the Court below found that there was not even a suspicion of fraud or conspiracy.

Appellee thus seems to concede the correctness of the rule contended for by appellants, and the question is whether the allegations in the bill bring it within the rule announced by the Williams case.

Appellee asserts in her brief, pages 37 and 38, that the fraud was alleged as a mere incident to the invalidity of this power of attorney, and her summary of the bill of complaint, pages 22 to 28, may lend color to this contention. But this summary is not a fair statement of the allegations of the bill, because a mere cursory examination will show that the charge of fraud and conspiracy are the whole basis and ground-work of the bill, and that they are so interwoven and intermingled with the other allegations as to be practically inseparable from them. If these allegations are eliminated, nothing is left.

The first charge of fraud occurs in Paragraph XI, the preceding paragraphs having been devoted to formal and jurisdictional allegations. After alleging fraud and conspiracy, appellee states her version of the agreement entered into in August, 1900, commencing this statement with the significant words "in this behalf complainant alleges."

In Paragraph XII, pages 13 and 14, she alleges her confidence in Campbell and Benson and the former's alleged false representations as to Benson's reliability.

In Paragraph XIII, pages 14 to 16, she alleges that both Benson and Campbell intended to defraud her and that the deeds were fraudulently prepared, and fraudulently and in furtherance of said conspiracy delivered to Benson.

Paragraphs XIV and XV, pages 16 to 18, allege that the powers of attorney with the names of the agent in blank were surreptitiously and in furtherance of the scheme to defraud inserted among the deeds sent by Campbell to complainant, knowing that she would sign the same without careful examination by reason of her confidence in him.

Paragraph XVI relates wholly to matters occurring after the inception of appellants' title, but it also alleges fraud, falsehood and conspiracy.

Paragraph XVII describes the various powers of attorney.

Paragraph XVIII alleges that the complainant did not know Cobban; that she never knowingly or consentingly gave him a power or powers of attorney; that she never acknowledged the said alleged powers of attorney, and that the certificates thereon are false and forged.

Appellee next alleges that there was no administration on the estate of Patrick Reddy in Idaho, the conveyance from Cobban as her attorney in fact to Weirick, and the issuance of patent (Trans. 29-34).

Paragraph XXIII (Trans. 34-35) alleges that Cobban and Weirick were mere tools and dummies of the Payette Lumber & Manufacturing Company and Benson, and that the whole transaction was a deal between the latter parties and for their benefit.

These are the substantial allegations of the complaint, and an examination of the joint answer of appellants Cobban and Weirick discloses that these allegations of fraud were in every case specifically denied while the existence of blanks in the powers of attorney was admitted. (Trans. 69-74, 78, 83-85.)

This comparison of the complaint and answer shows clearly that fraud and conspiracy was the substantial issue raised by the pleadings, and the record shows clearly that all the attorneys considered this to be the issue on the trial; and the trial court (Trans., p. 499) says: "Moreover, there is no substantial foundation for the charge *elaborated at great length in the bill* that Benson, Campbell, Weirick, Cobban and others conspired to defraud the plaintiff."

If these allegations of fraud are dropped from the bill, what is left? Certainly no cause of action in equity could be stated. There would remain the following: The allegation of citizenship and the jurisdictional amount, that the complainant is the owner of certain described lands in Boise County, Idaho, which are vacant and unoccupied and not in the possession of defendants (and this allegation as to non-possession is flatly denied by the answers), the description of the base lands, the description of the powers of attorney, the allegations at pages 28 and 29 that appellee did not know Cobban and never knowingly gave him a power or powers of attorney, and that the notarial certificates on such powers were false and forged; that there was no administration on the estate of Patrick Reddy in Idaho; that Cobban

deeded to Weirick as appellee's attorney in fact, and the prayer for relief.

Paragraphs XI, XII, XIII, XIV, XV and XVI cannot be considered, because every one of these paragraphs reeks with charges of fraud and conspiracy, and under the rule contended for in appellants' brief the correctness of which appellee seems to concede, these matters cannot be considered in face of the positive finding of the Court that there was no fraud. The alleged agreement, the alleged escrow, the alleged explanation of the signing of these instruments are thus completely out of the case, and appellee's claim amounts to this: A bill in equity to cancel deeds and powers of attorney brought against *bona fide* purchasers from complainant's attorney in fact, on the ground that she did not knowingly sign the power of attorney under which the conveyance was made; and she attempts to sustain her case on the equity side of the Federal court without proving that she has possession of the land in question or that the lands are vacant, unoccupied and not in the possession of defendants or other parties.

The Pleadings and Proof do not Sustain the Relief Granted.

Appellee attempts in her brief to lay aside the allegations of fraud and to claim that she is entitled to relief in equity on other grounds; but even if the Court could thus change the whole theory of the case, to the prejudice and injury of appellants, and allow this bill to be made the instrument of unfounded slander against these appellants and various other persons, we submit that a cause of action in equity is not shown either by the pleadings or the proof.

Courts of equity have jurisdiction to cancel deeds for fraud or mistake and in appropriate cases to cancel deeds that are clouds on title, but this latter jurisdiction is limited and cautiously exercised.

4 Pomeroy, Equity Jurisprudence, sec. 1377.

6 Cyc. 286.

Field vs. Holbrook, 14 How. Pr. (N. Y.) 103.

Mistake is neither alleged nor proved in the case at bar. 16 Cyc. 66, defines and distinguishes "accident" and "mistake" as follows:

"The terms 'accident' and 'mistake' have acquired generic and technical senses indicating grounds upon which courts of equity from a very early period have interposed to relieve a party from certain unjust legal burdens. By 'accident' is meant an occurrence unforeseen and not reasonably to be anticipated, whereby the legal rights of a party are affected to his injury without neglect or misconduct on his part. 'Mistake' is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time. An accident is something occurring subsequent to the transaction and reacting injuriously upon the legal rights of the party; it is objective. Mistake is subjective, relating to the mental condition of the parties at the time of the transaction, and thereby affecting the quality of the transaction in its inception."

This definition is substantially that given in 2 Pomeroy, Equity Jurisprudence, sec. 823 and sec. 839, and that author's statement is quoted with approval by the Circuit Court of Appeals of the Fifth Circuit in *L. Bucki & Son Lmbr. Co. vs. Atlantic Lmbr. Co.*, 116 Fed. 1. See, also, California Civil Code, sec.

1577. But these definitions clearly do not touch the facts of the case at bar. Here there was no erroneous conception as to the essentials of the contract. The whole difficulty was stated by the trial court to have been caused by the delivery to Benson of the title papers before he had paid over the money. This was at most a breach of his agreement with appellee or a breach of Campbell's agreement. It is no more a mistake entitling appellee to relief by cancellation than any breach of contract would be.

But counsel seem to contend that these deeds and powers of attorney were filled in or executed without authority, and can therefore be cancelled as clouds on appellee's title. This is apparently the theory on which the trial court proceeded, but the Court failed to recognize that appellee had not proved that these lands were vacant and unoccupied and not in possession of appellant, the Payette Lumber & Mfg. Company. This was an absolute essential to her right to cancellation on this ground, because she admitted in her own complaint that she herself was not in possession. (Trans., p. 3.)

The former strict rule of equity was that bills to quiet title or remove clouds on title could only be brought by the party in possession.

Alexander vs. Pendleton, 8 Cranch (U. S.), 462.

Holland vs. Challen, 110 U. S. 15, 26, 28 L. Ed. 52, 54.

This was on the theory that otherwise the true owner had an adequate remedy at law by an action of ejectment, and this rule was followed in the Federal court without regard to state statutes extending

equity jurisdiction to cases where the defendant was in possession. But in *Holland vs. Challen, supra*, it was held that where the land was not in possession of anyone, the true owner could maintain a bill to quiet his title or remove a cloud thereon, if the State statute allowed such action, because in that case there was no adequate remedy at law. This exception has become as well settled as the rule. See:

So. Pac. Ry. Co. vs. Stanley, 49 Fed. 263.

So. Pine Co. vs. Hall, 44 C. C. A. 363, 105 Fed.

84.

Section 4538 of the Idaho Code extending the scope of suits to quiet title provides as follows:

“An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.”

The rule applicable to such statutes is well stated in the note to *Whitehouse vs. Jones* (W. Va.), 12 L. R. A. (N. S.) 76, as follows:

“The question as to the effect on the chancery jurisdiction of United States courts of statutes enlarging equitable jurisdiction in the various states is settled. *The constitutional provision as to trial by jury, and the statutory provision forbidding equity from entertaining jurisdiction where an adequate remedy at law exists, are controlling.* But the constitution and statute are held to refer to the right to trial by jury as it existed at common law. If a State statute enlarging equitable jurisdiction does not deprive a party of the right to trial by jury as it existed at common law, the statute may be followed in the Federal courts; otherwise not. Practically this means that statutes permitting a party in possession to maintain a bill to quiet title, or allowing a party out of posses-

sion to bring an action to remove cloud from title to vacant or unoccupied land, may be given effect in the United States courts; *but statutes opening the doors of equity to a party out of possession, seeking, as against a party in possession, to quiet or remove a cloud from title, cannot be enforced under the United States Constitution and statute.*" (Our italics.)

Numerous authorities are cited to support this text.

In *Whitehead vs. Shattuck*, 138 U. S. 146, 34 L. Ed. 873, the Court, referring to the Iowa statute which is similar to the section above quoted, said at page 874:

"It thus enlarges the powers of a court of equity, as exercised in the State courts, but the law of that State cannot control the proceedings in the Federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

In the case of *Stockton vs. Oregon Short Line R. Co.*, 170 Fed. 626, section 4538 of the Idaho Code was construed by Judge Dietrich, who said at page 631:

"It will be noted that the Idaho statute does not in terms purport to enlarge the equitable jurisdiction of the State courts; nothing is said about actions at law or suits in equity; no procedure is prescribed. In general terms it declares the right of a party to have adjudicated any claim to or interest in real property when such claim or interest is controverted or questioned, whatever be its nature. It does not abolish existing remedies either at law or in equity. It embraces all condi-

tions, including those where an action in ejectment or a suit to quiet title or to remove a cloud upon a title would, in the absence of the statute, afford adequate relief. It includes and adds to these ancient remedies. *There is no evidence of any intention on the part of the Legislature to abrogate the general rule that suits in equity cannot be maintained where there is a plain, adequate, and complete remedy at law.* Nor could such a purpose, if manifest, be sustained. To do so would, in effect, be to nullify the right of jury trial, solemnly guaranteed by the fundamental law of the state. If, the conditions being such that an action in ejectment may be maintained, a party may, instead of bringing such an action, institute a proceeding under the statute, and if all such proceedings are to be regarded as suits in equity, then by a simple bit of legislative legerdemain a defendant may not only be deprived of his right of removal to the Federal court, but also of his constitutional right to a trial by jury, for, as we have seen, the Constitution guarantees such right only in actions at law. * * *

“As already stated, the plaintiff’s complaint here exhibits a case of equitable cognizance within the jurisdiction of this court. If, as is suggested in the briefs of both parties, the complaint does not truly or fully show the material facts, and if the defendant is actually in possession of the premises, the plaintiff may deem it wise to reform his pleading, for if he proceeds upon the equity side of the court he must fail, unless his proofs disclose a right of action cognizable in equity; there must be a correspondence of *allegata* and *probata*. The actual facts should be set forth from which it may be determined whether the court, *ratione materiae*, can entertain jurisdiction, and, if so, whether the cause should proceed upon the equity or upon the law side of the court, or possibly in part upon one side and in part upon the other.” (Our italics.)

In *Lawson vs. U. S. Mining Co.*, 207 U. S. 1, 52 L. Ed. 65, a case decided on the Utah statute identical with section 4538 of the Idaho Code, it was said:

“Of course, as pointed out in *Whitehead vs. Shattuck*, 138 U. S. 146, 34 L. Ed. 873, such a statute cannot be relied upon in the Federal courts to sustain a bill in equity by one out of possession against one in possession, for an action at law in the nature of an action of ejectment affords a perfectly adequate legal remedy.”

Other cases supporting this proposition are:

Wehrman vs. Conklin, 155 U. S. 312, 39 L. Ed. 167.

Gordon vs. Jackson, 72 Fed. 86.

Giberson vs. Cook, 124 Fed. 986.

U. S. vs. Wilson, 118 U. S. 86, 30 L. Ed. 110.

McGuire vs. Pensacola City Co., 44 C. C. A. 670, 105 Fed. 677.

Frey vs. Willoughby, 11 C. C. A. 463, 63 Fed. 865.

Adoue vs. Strahan, 97 Fed. 691.

Davidson vs. Calkins, 92 Fed. 230.

Morrison vs. Marker, 93 Fed. 692.

Taylor vs. Clark, 89 Fed. 7.

The three cases last cited were cases decided under the California statute, which is identical with the Idaho statute above quoted.

None of the cases above cited are open to the criticism found at page 45 of appellee's brief, and many of them involve statutes identical with section 4538 of the Idaho Revised Codes. These cases completely refute appellee's contention that the Idaho statute is controlling, but it may be well to review briefly the cases cited by appellee.

More vs. Steinbach, cited at page 49, cannot be taken as a true statement of the law after the later decisions in Whitehead vs. Shattuck, Wehrman vs. Conklin, and Lawson vs. U. S. Mining Co., *supra*, which all hold precisely to the contrary. The quotation cited from Devine vs. Los Angeles, 202 U. S. 312, is a mere general statement made in a case where complainants had possession and without the necessary qualification that such statutes cannot deprive defendants of their right to a jury trial.

The cases of Darragh vs. Wetter Mfg. Co., Gormley vs. Clark and Cowley vs. Northern Pac. R. R. Co., are cases where there is no adequate remedy at law, and therefore the rule has no application; but in the case at bar, as appellee could not prove that the land was not in the possession of defendants, she should have brought her action on the law side of the Federal court, proved her title, and challenged the validity of the deeds and powers of attorney upon which the defendants would have had to rely. The validity and binding character of these instruments were mere questions of fact on which appellants were entitled to a jury trial, and by this action at law appellee would have had an opportunity to prove her title and to obtain possession, so her remedy at law was complete and adequate.

The case of Sayers vs. Burkhardt, cited at page 44 of appellee's brief, was a case where fraud was alleged and proved, and in such cases the courts may well hold possession to be immaterial. But here the Court has found that fraud did not exist and the jurisdiction of a court of equity must be rested solely on the ground of a bill to quiet title, or to remove a

cloud upon title; and in order to sustain this jurisdiction, appellee was required by her pleadings to prove that the lands were vacant and unoccupied, and not in the possession of defendants or any of them. This became one of the vital and controlling issues in the case, and by reason of the Court's changing the theory on which the case was tried, appellants had no opportunity whatever to meet this issue.

The allegations of Paragraph 7 (Trans. 3, 4) of the complaint in this regard were flatly denied in the answer (Trans. 42, 54, 67, 68), and the burden of proof was on appellee to show nonpossession by defendants and jurisdiction of the cause in equity. Not only did she wholly fail to do so, but the trial Court assumed (Trans. 518) that defendants were in possession.

This review of the authorities shows not only that the change in theory was absolutely prejudicial to appellants, but that appellee wholly failed to prove a cause of action cognizable in equity.

Appellant (Cobban) had Implied Authority to Insert His Name in the Blank Powers of Attorney and to Convey to Weirick as Attorney in Fact for the Appellee.

The proposition stated above has been discussed at length in appellants' first brief (pages 49 to 68), and there will be no occasion for discussing the matter further, except that counsel for appellee have cited and extensively quoted from certain cases some general statements, which, taken by themselves and apart from the facts of those particular cases, might be considered as supporting a proposition different from that contended for by these appellants. It

would seem, however, that the question has been fully disposed of by at least three courts upon the particular facts which we have in this case, all the decisions being in support of appellant's contention. We refer to the decision by the United States District Court for the Northern District of California in *United States vs. Conklin*, 169 Fed. 177, and the decision of this Court upon the appeal taken in that case reported in 177 Fed. 55; also the decision of the Supreme Court of California in *Conklin vs. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537. An examination of the decisions referred to will show that the facts before the Court in those cases and the doctrines upon which those decisions rest are identical with the case at bar. It is true that in those cases the attorney in fact, Mr. C. L. Hovey, did not insert his own name in the power of attorney; but it is equally true that the powers of attorney there before the Court were executed in blank, and that the blanks were filled in by Benson or someone under his direction. It matters not who filled in the blanks; it is sufficient that they were filled in by someone after they had left the possession and control of Mrs. Conklin and that the instrument when executed by her was identical with the instruments which we have in this case. Counsel for appellee have cited several of the older decisions of the Supreme Court of California in support of their contention. We would respectfully, however, refer this Court to the latest expression of the California court on this question, which is found in *Conklin vs. Benson*, *supra*. The Court in that case said:

“According to the evidence of plaintiff, these papers were sent from the office of Mr. Campbell to her for signature, and she, relying entirely upon him and believing that they were simply deeds to Benson, signed them and returned them to his office. There was no deposit in escrow of any of these papers, and they were apparently all placed in Benson’s possession. The deeds to the United States of the base land were recorded in the proper counties. Benson thereupon proceeded in an endeavor to sell such land as might be selected as lieu land. Defendant Hovey was the agent of defendant Walker, who was making large investments in public lands. He had already had dealings with Benson in such transactions, and in the particular transactions as to Monache lands followed a very ordinary course of business in such matters; viz., selected lieu land as specified by his principal, Walker, indicated such selection to Benson, and upon the production by Benson of proof of the filing of a proper application for lieu lands in the local land office and by delivery of a power of attorney of the owners appointing him, Hovey, attorney in fact to convey the land, paid to Benson the agreed price, subsequently conveying to Walker the selected lands. The powers of attorney bore certificates of acknowledgment by the owners before a notary public, but plaintiff testified that she had never appeared before the notary or acknowledged any of the instruments. Both the other principals, Mrs. Reddy and Edward A. Reddy, and the notary public, died prior to the trial. The evidence is sufficient to support the conclusion of the trial court that so far as the naming of an attorney in fact is concerned, the powers of attorney were blank at the time of the signing by the owner and the placing of the same in Benson’s hands, and that Benson on making a sale would put in such blank the name of such person as attorney in fact as was desired by the purchaser. . . .

“There is no foundation in the facts above set forth for the conclusion that the papers signed by plaintiff were forgeries, and absolutely ineffectual

even to serve as a basis for the application of the doctrine of estoppel. The theory of the learned judge of the trial court appears to have been that all of these papers, including the deeds of the Monache lands to the United States, were in effect forgeries, and absolutely void. The idea underlying this apparently was that plaintiff was so deceived in the matter of executing these instruments as to bring her within the doctrine of certain cases which substantially hold that where a person who has no intention of selling or encumbering his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is just as much a forgery as it would have been had the signature been forged. These decisions are not such as to sustain plaintiff's claim in this regard. The distinguishing feature between all such cases and the case at bar is that here plaintiff fully understood and believed that she would convey all her interest in the Monache lands. She intended to execute papers having this effect. The difference between the papers she thought she was signing, according to her evidence and the papers she actually signed, was merely one of detail and in no degree material, one set of papers having precisely the ultimate effect of the other,—the conveyance of her interest in this land. Her real and only complaint upon her own testimony was her failure to personally receive full payment for her land, claimed to have been occasioned by reason of the failure of her agent to place the papers in escrow to be taken up as payments were made, and the delivery thereof to Benson without payment first having been made. This failure could not make the papers 'forgeries' in any sense of the word."

The Court then cites cases showing that the proposition for which appellee contends in the case at bar has no application to this case, and referring to the question of the acknowledgment, the Court says:

“There is nothing in the law of this State which makes an acknowledgment by plaintiff, or a certificate of such acknowledgment, essential to the validity of any of the papers actually signed by the plaintiff.

“Under such circumstances as are disclosed by the record in this case, the rule established by the overwhelming weight of authority is that the equities of innocent purchasers are protected, even if injury be done to the party who has been imposed upon or defrauded by her agent or original grantee.”

It seems to us that the decision of the California Court in the above case is conclusive on the proposition that the failure of appellee to acknowledge the instruments (if the evidence be held to so show), and the fact that they were executed with the name of the agent omitted, do not render the powers of attorney forgeries or ineffectual; and also on the proposition that the fact that the papers were not placed in escrow as appellee assumed they would be, does not affect appellants in this case, who had no knowledge of such an agreement.

The facts before the Court in *United States vs. Conklin*, 177 Fed. 55, are such as to make that decision equally conclusive as to this case. In that case it was held that the title which the Government received to the Monache lands was good, and that it was unaffected by the fact that the papers did not go through the escrow-holder, or that they were delivered contrary to the intention of appellee. The Court held that the acknowledgment was not essential to the validity of the deed.

Appellee occupies the insistent position of claiming in her complaint as a basis for equity jurisdiction

that she trusted and relied upon Campbell and Benson, and that because of the great confidence and trust reposed in these men she is especially entitled to the aid of equity. But in her brief she insists that Benson and Campbell had no authority in the premises, and that she did not trust them, and that she is not, therefore, subject to the maxim so frequently applied in these cases that "Where one of two innocent persons must suffer by the fraud or negligence of the third, whichever of the two has accredited him ought to bear the loss."

It was appellee who furnished Benson, directly or indirectly, with the instruments which she now seeks to have canceled and by means of which he obtained appellant's money. It is not a question of what his *actual* authority in the premises or as her agent may have been; it is merely a question of whether he was clothed with *apparent* authority to transact the business which appellants had with him. The Supreme Court of California and this court have both held that he had such *apparent* authority and that purchasers of scrip from him will be protected. There is nothing in the record to take either of these appellants, and especially the Payette Lumber and Manufacturing Company, out of the doctrine followed by this Court in *United States vs. Conklin* and by the California Court in *Conklin vs. Benson*.

Appellee suggests that the Payette Lumber and Manufacturing Company, purchasing from Weirick as trustee, was under obligation to inquire for whom he acted as trustee. It is submitted, however, that that is not a matter concerning appellee. The inquiry

would only be for the purpose of ascertaining whether Weirick had proper authority from the *cestui que trust* to convey or whether he made the conveyance in violation of his duty as trustee. Such inquiry on the part of the Payette Lumber and Manufacturing Company could have led to nothing that would have disclosed the relation between Mrs. Conklin and Campbell and Benson, or whether the latter had in all respects observed their agreements, or performed their duties to appellee.

Respectfully submitted,

RICHARDS & HAGA and

McKEEN F. MORROW,

Solicitors for Appellants.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

R. M. COBBAN, E. B. WEIRICK, Individually, and also as
Trustee, and THE PAYETTE LUMBER AND MANU-
FACTURING COMPANY, a corporation, Appellant,

vs.

MOLLIE CONKLIN, Appellee.

PETITION FOR REHEARING.

*Upon Appeal From the United States District Court for the
District of Idaho, Southern Division.*

*To the Honorable, the United States Circuit Court of
Appeals, for the Ninth Circuit:*

Your petitioners, R. M. Cobban, E. B. Weirick, individual-
ly and also as Trustee, and The Payette Lumber and Manu-
facturing Company, appellants in the above entitled cause,
respectfully petition your Honorable Court to grant a re-
hearing in said cause, and your petitioners especially claim

error in the decision filed herein in the following particulars:

1. This court erroneously assumed that the decision of the District Court rested upon the fraud of Benson and therefore affirmed the decree below on the ground of fraud, when the fact is that such decree rested exclusively upon other grounds, viz., (a) That the powers of attorney to convey were inoperative and void because of certain blanks therein; (b) That the powers of attorney to convey were inoperative, ineffectual and void because they were delivered by what the court considered an escrow holder before there had been a full compliance with certain escrow instructions.

2. This Court erroneously assumed that there is sufficient evidence of fraud upon which to found a decree and that the District Court had based its decree on such fraud, when the record only discloses at most a mistake or misunderstanding on the part of all parties, or a failure of the minds to meet or a failure of the parties to agree as to the understanding reached, and the District Court so found.

3. This Court erroneously held that appellants had waived the objection that the District Court was without jurisdiction because defendants were in possession, and this Court entirely overlooked the fact that such objection could not be raised in the Court below for the reason that under the theory of the Bill possession was not material, as the Bill was based on a conspiracy to defraud and not on mistake or upon the insufficiency of the powers of attorney or the default of the escrow depository, and the cause was tried upon the theory that the powers of attorney and deeds

should be canceled because of such fraud, and upon such theory the question of possession was immaterial as equity would take jurisdiction on the ground of fraud; whereas the District Court found that it could grant no relief because of fraud, but decided the cause upon another theory which rendered possession essential to jurisdiction. The objection urged is therefore raised at the first opportunity.

4. That a bona fide purchaser for value without notice who purchases from a person in absolute and complete possession of property, and who is and has been paying the taxes thereon, is protected as against the claim of the grantor of such person who claims that the deed from him was delivered by the escrow depositary in violation of his instructions; and this Court erroneously adopted a contrary rule, based upon authorities which show that the alleged bona fide purchaser in such cases had either actual or constructive notice of the escrow or defect in the title.

5. That while this Court correctly held that a bill to set aside a conveyance on the ground of fraud will not sustain a decree granting such relief on an entirely distinct ground of equitable jurisdiction, such as mistake, yet this Court did in fact the very thing which it said could not be done; for the evidence shows conclusively, and the District Court so found, that no two of the parties involved in the transaction understood the agreement in the same way. Mrs. Conklin says the land was to be conveyed direct to Benson and not to the United States. Mr. Campbell denies this, and corroborates Benson to the effect that it was a lieu land scrip transaction, and that the land was to be conveyed to the United States and lieu lands selected and the scrip sold, but disclaims any recollection of powers of attorney to con-

vey. Benson, on the other hand, testifies clearly and is corroborated by the strongest circumstantial evidence, that the agreement was exactly as he undertook to carry it out. These conflicting statements as to the terms of the agreement show conclusively the failure of the minds to meet, and each was proceeding under a mistaken idea as to the agreement that had been reached; but there is not the slightest justification for charging Benson with fraud because the three parties concerned did not all understand the agreement alike. This Court after finding that there was no conspiracy or the slightest fraud on the part of appellants, says: "But the fraud of Benson was proven, and it was the proof of his fraud which justified the decree. Benson fraudulently procured the execution of the powers of attorney in blank, and fraudulently procured the possession thereof after their execution;" whereas, the District Court, after reviewing the facts and finding that the minds of the parties never met on the procedure for accomplishing a transfer of the Monache lands and that the charges of fraud were not sustained, states the basis of its decree as follows: "We are thus brought to a consideration of what seems to be the controlling issue of the case, viz., To what extent, if at all, is the plaintiff bound by the unauthorized delivery of the blank powers of attorney to convey?" And it thereupon proceeds to found its decree upon the propositions that powers of attorney executed in blank are inoperative and void, and that an instrument delivered by an escrow depositary in violation of its instructions is also ineffectual and void; and the question of fraud does not in any degree affect the legal propositions upon which the District Court based its decree.

6. This Court erroneously assumed that there was any evidence in the record to sustain the statement in its opinion that "Benson fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution," the evidence being only to the effect that Benson, in accordance with this agreement as understood by all parties, prepared all papers and sent them to the office of Campbell, Metson & Campbell, and in course of time they were returned to Benson's office signed by plaintiff; and the charge of fraud on the part of Benson in procuring the execution or possession of the powers of attorney, or any other paper does not receive the slightest support from the evidence in the record. Such charge must rest entirely upon the unsupported and abandoned allegations of fraud contained in the Bill.

7. This Court is in error when it says that: "There is no evidence that appellee knowingly and intentionally executed those papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did," when the evidence is contradicted that all papers were sent to Appellee at her residence, without any representations from any one as to what they were, and she was allowed to take her own time for examining and re-examining them and for conferring with others over them; that after signing them she returned them to the offices of Campbell, Metson & Campbell, who had all the time they desired, uninfluenced by any one, to examine them both before and after they had been signed by appellee, and some one in that office later and in due course sent them to Mr. Benson's office. The failure of appellee or

her counsel to examine the papers or to understand them, if such be the case, cannot be charged to any act of Benson.

8. This Court and the District Court both fell into the same error, viz., when the proof disclosed the failure of the minds to meet on the procedure for selling the Monache lands, the courts have accepted the version of appellee as correct as to one or two particulars; they have accepted Benson's version as correct in some particulars, and have accepted some statements from Campbell's testimony. They have believed and disbelieved each in part, and out of these irreconcilable fragments from the testimony of each both courts have evolved a new contract, which is not the contract which appellee thought she had entered into nor the one that Benson understood he was a party to, nor the one that Campbell understood the parties had agreed upon. It is undeniably and exclusively the contract of the court, and it is respectfully submitted that appellants, who are innocent in fact and who purchased for a valuable consideration without notice or knowledge of such contract, should not be made to suffer because Benson or Campbell, or both, failed to comply with all the terms thereof.

9. The Court erroneously assumed that the powers of attorney to convey were to be placed in escrow, to be delivered under certain instructions and upon certain conditions; whereas, appellee, both in her evidence and in her Bill, strenuously contended that there were to be no powers of attorney whatsoever, but that the transaction was to consist simply of deeds conveying the lands directly from her to Benson; and it is only the agreement evolved by the Court, as aforesaid, out of the irreconcilable fragments of conflict-

ing evidence that provides for the powers of attorney to be placed in escrow.

10. The Court overlooked the proposition that the act of an agent cannot be ratified in part and disaffirmed in part; that the principal will not be allowed to claim that which benefits him and repudiate the rest, and that appellee cannot claim the benefit of Benson's and Campbell's acts as to the exchange of the Monache lands for the lieu lands in Idaho, and repudiate the balance of the transaction.

Your petitioners in this petition simply aim to show that there is sufficient probability of error in the decision filed to justify a rehearing and a reargument of this cause, and your petitioners do not herein undertake to discuss or cite the many authorities bearing on the questions raised. In support of the errors alleged the following brief argument is submitted.

ARGUMENT.

The District Court Did not Base Its Decree on Fraud.

This Court erroneously assumed that the District Court founded its decree on fraud. Had it done so it would have been reversible error, for it is respectfully submitted that there is no such fraud disclosed by the record as to set aside the title of a bona fide purchaser for value, and we think it would be a gross injustice to the trial court to charge that its decision and the decree appealed from rested on such flimsy evidence as that produced by appellee in support of the allegations in the Bill, recklessly charging a conspiracy on the part of all to defraud her out of her lands.

The Trial Court instead of finding fraud found that the

minds of the parties had never met as to the procedure for effecting a transfer of the Monache lands, and that there was therefore an honest misunderstanding, and that the hasty suspicion which appellee and her son had formed or entertained towards Campbell and Benson rested simply upon the fact that the parties proceeded to carry out the agreement as each understood it, not knowing that they did not all understand it alike. The evidence in the record shows conclusively that Benson understood the agreement to cover or embrace the procedure which he was attempting to carry out. The Trial Court said on this question :

“The truth probably is that, upon the one side, the plaintiff, not being familiar with the procedure by which base lands are exchanged for lieu lands, gave little attention to, and did not understand, such explanations as may have been made by Benson, and went away with the impression only that Benson was to purchase, and that she was to deed to him directly, her interest in the base lands. Upon the other hand, Benson, being advised of the conditions under which base lands could be handled and exchanged, and being familiar with the procedure, understood that the owners would execute, and, in due time, deliver such papers as were necessary to make the exchange and transfer. The plaintiff wanted to sell the lands and was interested particularly in procuring the desired price. Being concerned only with the ultimate result, she probably gave very little thought to the means by which that result would be reached. In view of the entire record, it is wholly improbable, and I am unable to conclude, that Benson agreed or that he understood, that he would directly purchase the base lands, or that deeds from the then owners were to convey the title to him personally.”

This falls far short of charging Benson with fraud. On page 499 of the transcript the learned District Judge says, in his opinion :

“Moreover, there is no substantial foundation for the charge, elaborated with great length in the bill, that Benson, Campbell, Weirick, Cobban and others conspired to defraud the plaintiff.” (Our italics).

This Court apparently overlooked the fact that the trial Court exonerated not only appellants but Benson and Campbell from the charge that they had in any way conspired to defraud plaintiff. Referring to appellants alone, the Trial Court said (Trans. p. 499) :

“So far as Cobban and Weirick are concerned together with their associates and the promoters and officers of the defendant Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff.”

And referring to Campbell, the Court said (p. 499) :

“While there is much in the record to support the fact that Campbell failed to properly discharge his obligations to the plaintiff, it cannot be held that he conspired with Benson, or at any time entertained corrupt or improper motives.”

The most that can be said against Campbell is that he did not give much personal attention to the transaction, and the most that can be said against Benson is that he did not pay over to Campbell or appellee all the money that he received from the sale of the scrip, and that the letter which he

wrote to Campbell in December, 1909 (Complainant's Exhibit N.-1, p. 476), did not go sufficiently into detail and did not fully disclose what had been done or accomplished; but it should be noted in this connection that Mr. Benson assumed and he had a right to assume that Campbell understood the agreement as he understood it, and that Campbell knew that powers of attorney to convey formed a part of the transaction and that they had been executed and delivered to him. This conclusion Benson had a right to entertain, because all the papers had gone through Campbell's office twice before they were used by Benson, and there had been ample opportunity for everyone in Campbell's office to examine them and become familiar with their contents. The papers had all been prepared by Benson and transmitted to the office of Campbell, Metson & Campbell for their examination and approval, and, if found correct, then they were to forward them to appellee.

The record shows further that Campbell, Metson & Campbell sent the papers to appellee, including the powers of attorney to convey; that they were received by her, either at her residence or hotel, without any representation that they were all alike or were of any particular kind; they were left with her to examine and consider in her own way and in her own time. She could examine them and re-examine them and confer with anyone she pleased. She signed them all and returned them to the office of her attorneys, who had a second opportunity to examine and become acquainted with their contents, and who thereupon, through some one in the office other than Mr. J. C. Campbell himself, delivered them to Mr. Benson. IS THERE

THE SLIGHTEST FOUNDATION FOR THE CHARGE THAT BENSON FRAUDULENTLY PROCURED THE EXECUTION OR THE POSSESSION OF THESE POWERS OF ATTORNEY, OR ANY OTHER PAPERS?

“Fraud or breach of trust ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt. *Story, J. Prevost v. Gratz, 6 Wheat. 498.*”

“To constitute fraud, the intent to deceive must clearly appear.”

McGee v. Manhattan L. Ins. Co., 92 U. S. 98.

The trial court does intimate in its decision that Benson in his letter of December 11, 1901, was putting appellee's claim for payment off by “evasion and deception.” This letter, however, was written long after appellant Cobban purchased the scrip, and the statements of the court were made not for the purpose of showing that charges of fraud on Benson's part were sustained, but the statement was made in connection with appellant's contention that appellee was barred by her laches, the court in effect saying that the letter did not fully apprise appellee of all the facts. It should be noted also that when Benson wrote this letter it is conceded that none of the titles to the base lands had been approved, and that appellee was therefore not entitled to any payment under her contract with Benson; but, notwithstanding this, Benson had already advanced her \$2750.00 on the purchase of the Monache lands. Mr. Camp-

bell testified that all payments were made before November 4, 1901, (pp. 354-355), and appellee alleges in her bill that the amount she received was paid before August, 1901 (trans. p. 18).

The letter states that nearly all the scrip had been sold under contracts, by which payments were to be made by the purchaser only after approval of the titles and execution of a deed by the owner. This statement was subject to some criticism from the trial court because appellant Cobban had paid for his scrip before the letter was written. However, the title had not been approved, and had the title failed, Benson would have been required to return the money to Cobban. In any event, appellee would not have been entitled to both the money and the base lands.

There is nothing to show that the remaining two-thirds of the base lands or Monache scrip had been sold and paid for. The charge, therefore, made in the opinion of this Court that "Benson fraudulently procured the execution of the powers of attorney in blank, and fraudulently procured the possession thereof after their execution," we respectfully submit is not sustained by either the evidence or the opinion of the court below, but must rest entirely upon the charges of the bill and the unsupported statements in appellee's brief.

The trial court, after reviewing the facts, proceeds to give the basis of its decision as follows (transcript, p. 508): "*We are thus brought to a consideration of what seems to be the controlling issue of the case, viz., to what extent, if at all, is the plaintiff bound by the unauthorized delivery of the blank powers of attorney to convey?*" And the court

then proceeds to give several reasons why the decision of the Supreme Court of California in *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, does not control the case, but nowhere does it show that the distinction arises because of any element of fraud.

The opinion in this court, therefore, not only erroneously assumes that the decree below was founded on fraud, but it does the trial court an injustice by holding that the trial court found fraud to exist when it had no such intention and did not so find; and appellants are further wronged by having the cause decided upon a theory which it was assumed had been entirely eliminated from the case, and which, therefore, was not presented upon the original hearing, because it was assumed by all parties that the element of fraud had not been proved, and that the decision below rested entirely on the validity or invalidity of powers of attorney executed in blank and delivered in violation of certain assumed escrow instructions.

Question of Jurisdiction Not Waived.

This court correctly holds that where a plaintiff founds his bill on fraud he cannot recover on another ground of equitable jurisdiction. It says:

“We may concede the doctrine which is contended for, that relief must be founded upon and consistent with the facts set up in the bill, or with some theory of the case on which the bill is based, and that a bill to set aside a conveyance on the ground of fraud will not sustain a decree granting such relief on an entirely distinct ground of equitable jurisdiction, such, for instance, as mistake.”

But, as we read the opinion, the Court does the very thing which it says cannot be done, for the record in this case shows mistake—the failure of the minds to meet, or the execution of papers without fully understanding their contents—and not fraud. That appellee made a conspiracy to defraud the frame and texture of her bill must be conceded; and it must likewise be conceded that the decision of the trial court rests entirely on the theory that the powers of attorney to convey were ineffectual and void because they were executed in blank and delivered without authority. And it must likewise be conceded that Benson acted in a way that was most open and frank in submitting the papers to appellee's counsel for her signature, and that they were in turn delivered to Benson by her counsel without the slightest evidence of fraud or deception on the part of Benson; and it is only the execution and delivery of the papers that can affect the title of these appellants. They cannot be divested of their title by subsequent proceedings, or letters, or communications, written or had, or defaults of Benson after the title papers passed into appellant's possession.

A distinguished writer on equity jurisprudence says that actual fraud may “in its extrinsic nature be reduced to two essential forms—false representation and fraudulent concealments.”

2 Pomeroy, Eq. Jurisprudence, Sec. 875.

The procedure followed by Benson in preparing the papers, submitting them to appellee's counsel, and receiving them back was in exact accordance with the agreement as he understood it, and he acted in as open and frank a manner

as it was possible for a person to act. The evidence is uncontradicted that Benson understood that the agreement which had been entered into clearly provided that these powers of attorney were to be executed and turned over to him as a part of the scrip papers, to be sold in the only manner that scrip was being sold. (Trans. pp. 384, 396, 401, 403-404, 420, 426-427, 435, 439.)

Mr. Cobban testified that he had purchased a large amount of scrip and was thoroughly familiar with the business, and that the manner in which Benson handled the scrip involved in this case was the customary manner followed by scrip dealers. He says, (trans. p. 262) :

“It is the usual custom, and was the case in every selection covering some two hundred selections which I handled at that time. And I will further state that not only myself, but I was familiar with the methods being pursued by all the large companies at that time acquiring lands in that vicinity.”

It was the only manner in which the scrip could be sold to advantage, and it is doubtful if it could have been sold at all in any other manner. Mr. Benson, as a scrip dealer, naturally had in mind in his negotiations the course that was universally followed in the handling of such scrip and he cannot under the circumstances be charged with the intention to defraud.

When the transaction is considered in its entirety it will be seen that unlimited and unrestricted opportunity was given appellee and her counsel at every step to raise objections that the real agreement, as they understood it, was not being carried out by Benson. N. E. Conklin, appellee's son,

went over the forms of deeds to the United States and aided Benson in preparing the same. (See testimony of Mr. Benson, trans. pp. 387, 389, 490, 419, 420, 440, 442, 452, 453; and of Mr. Lavenson, pp. 365-366; and of Miss Glover, pp. 370, 372, 374.)

Appellee says she read some of the deeds that she signed. If she did, she must be held to know that they were deeds conveying the lands to the United States and not to Benson, for these deeds clearly so state on their face. (See deed, trans. p. 454.) It should be noted also that appellee received two payments, aggregating \$2750.00, long after she signed the papers in question, and that she received the money not from the Anglo-California Bank, through whom she says the money was to be paid, but from Mr. Campbell, who in turn received it from Mr. Benson. This is most significant in view of the contention of appellee that the papers were to be placed in escrow with the bank referred to, and the money paid through said bank. It is strong corroborative evidence of Campbell's and Benson's testimony that there was to be no escrow. It is strange, to say the least, that appellee did not become suspicious, if not curious to ascertain how Campbell could have secured the money from the bank without an order from her.

If the original agreement contemplated an escrow it would seem that the escrow feature was waived when the payments were made direct to Campbell and accepted by appellee. It would seem that Mr. Campbell was clearly of the opinion that no escrow was contemplated, or he would not have asked or demanded that Mr. Benson pay the money direct to him. All the circumstances contradict both the

bill and the testimony of appellee, and corroborate in the strongest manner the evidence of Benson and of Campbell regarding the escrow.

There being no fraud on the part of Benson in procuring the execution or the possession of the papers, but at most a mistake in not understanding the agreement as appellee understood it, there can be no foundation for the contention that the decree nevertheless can or may rest on fraud, and the rule announced in *Eyre v. Potter*, 15 How. 41, and *Price v. Berrington*, 7 Eng. L. & Eq., 260, and other cases cited on page 18 of appellants' brief in support of this proposition, and the rule as approved by this court in its opinion, must therefore defeat recovery by appellee, for the theory upon which the cause was decided by the court below is neither the theory of the bill nor the theory upon which the case was tried. Equity has jurisdiction on the ground of fraud regardless of possession, and as the whole frame and texture of the bill was a gigantic and vicious conspiracy to defraud appellee that was necessarily the controlling issue upon which proof was submitted. Individual fraud was not charged or claimed. The attack on appellants' title was because of the fraud which it was claimed they had participated in through the alleged conspiracy. On that issue possession was immaterial. But when the court below found that the charges of fraud had not been proven yet granted relief on the new theory that the powers of attorney to convey were ineffectual, for the reason that they had been executed in blank and had been delivered in violation of escrow instructions, the situation entirely changed, and the question of possession thereupon immediately became essential to the jurisdiction of the court. There was then

no opportunity to meet the question in the court below. The evidence had been taken and the cause submitted before counsel knew that this new theory would be advanced by the court. It was raised in this Court, which was the first and only opportunity appellants have had to present the question. It is submitted, therefore, that this Court is in error when it says in its opinion that this question was waived in the trial court.

Appellee Is Not Entitled to Relief on the Ground of Mistake or Cancellation of Clouds on Title.

Mistake was not pleaded in the bill, and there was no attempt to recover on that ground; yet the proof shows that the difficulty arose through mistake and not through fraud. The minds of the parties never met; the trial court so found and the record so conclusively shows. It is clearly a case of misunderstanding, but there can be no relief in this case on that ground as the theory of the suit was a conspiracy to defraud. It is not a suit to remove a cloud on title or to cancel instruments executed through mistake or inadvertence, or without a clear knowledge of their contents.

Mistake will not entitle a party to affirmative relief as against a bona fide purchaser without notice.

2 Pomeroy, Equity Jurisprudence, Sec. 776.

Hence if mistake had been alleged it would not have availed appellee as against these appellants, who bought the scrip for value in the ordinary course of business, and without notice of any infirmities in the title, and in no event could appellee recover as against the appellant Payette Lum-

ber and Manufacturing Company which paid full value to appellant Weirick, relying upon the record title.

Execution of papers by mistake does not render them void, and a purchaser in good faith, without notice of the mistake, is, under all the authorities, protected in his title.

The Agreement Evolved by This Court and the District Court Is Not the Agreement of the Parties.

We think both this Court and the court below inadvertently fell into the error of attempting to construct an agreement out of fragments from the conflicting testimony of appellee, Campbell and Benson, and, in doing so, an agreement was evolved that can by no possible means be recognized as the agreement upon which appellee based her bill, or as the agreement which she thought she had entered into; neither is it the agreement of Benson, and it is not the agreement that Mr. Campbell understood the parties had reached, and under which he played an important part. It is disowned by them all; it is neither "flesh, fish, or fowl." It is not a workable agreement, or one that the parties could or would have entered into with any expectation of carrying out. Appellee alleges in her bill and testifies most clearly that the agreement, as she understood it, provided that she should convey the lands direct to Benson and not to the United States; that the deeds were to be placed in escrow in the Anglo-California Bank, to be paid for in ninety days and delivered as paid for, on the basis of \$3.80 per acre. She is positive that there were no other papers to be executed, and the gravamen of the conspiracy alleged in the bill is the fact that other papers not embraced in the agreement, were submitted to her and signed without she having first

been made acquainted with the contents thereof. She strenuously insists that powers of attorney to convey had never been thought of in connection with this agreement.

This Court and the court below have accepted only so much of her testimony as relates to the price of \$3.80 per acre, and that an escrow of some kind had been considered. Campbell testifies that there was to be no escrow, but that the land was to be deeded to the United States and the lieu land selection rights, or scrip, sold. The procedure does not appear to have been clearly understood by him. He has no recollection of any powers of attorney to convey, although the court found (trans. p. 495), and Campbell so testified, that he took the notary, Holland Smith, to the hospital in order to secure the acknowledgment of Edward A. Reddy, and among the papers which were at that time signed and acknowledged by Mr. Reddy were powers of attorney to convey (Exhibits D and L, pp. 469, 474).

The Court has apparently accepted only that portion of Mr. Campbell's testimony which was to the effect that the lands were to be conveyed to the United States and the scrip sold. Mr. Benson's testimony agrees with Campbell's in this, that it was to be a scrip transaction, and the base lands were to be conveyed direct to the United States. Benson and Campbell also agree that there was no escrow either thought of, considered, or agreed upon. Benson, however, is the only one who clearly and positively testifies that powers of attorney to convey were to be executed and delivered as part of the scrip transaction.

In short, we have, therefore, the testimony of Campbell and Benson that there was to be no escrow, and the testi-

mony of Mrs. Conklin that there were to be no powers of attorney, but that deeds to Benson were to be placed in escrow.

The composite agreement evolved by the court out of these inharmonious elements includes Benson's version of the agreement that powers of attorney to convey were to be executed, but it places such powers of attorney in escrow against the unqualified testimony of Campbell and Benson that there was to be no escrow, and against the positive charges of the bill and testimony of Mrs. Conklin that there were to be no powers of attorney. This new agreement also recognizes that the deeds were to run to the United States and to be filed for record immediately, and that applications for the selection of lieu lands and powers of attorney to make such selections were to be executed and delivered to Benson for sale, with only the powers of attorney to convey held back in escrow. Hence there is created a contract which is neither the contract of Conklin, Campbell or Benson, and it is not surprising that all the parties failed in some respects to comply with its terms.

But it is submitted that there can be no justification for charging Benson with fraud because he violated the terms of a contract which did not exist in the minds of any of the parties to the transaction. The record clearly shows that the parties were attempting to put themselves in a position to sell the scrip under the act providing for lieu land selections. By closing the deal and conveying the lands to the United States and placing the deeds of record before October 1, 1900, the grantors could avoid the effect of the Act of June 6, 1900, limiting lieu land selections to surveyed

lands (trans. pp. 391, 392). It was to the interest of all parties to expedite matters and get the deeds recorded before that date, hence the application of Campbell to the Superior Court for an order in the Estate of Patrick Reddy, authorizing the conveyance by that estate to the United States of the estate's interest in the Monache lands. This order was procured on September 19, 1900 (trans. pp. 457-462), and recites on its face that it was for the purpose of securing lieu land scrip in lieu of the Monache lands.

It was agreed also that no money was to be paid until the title to the Monache or base lands had been approved by the Government (trans. pp. 326-327, 337, 338, 357, 361, 386, 437, 448, 496). It was likewise understood that Benson would have to sell the rights to select, or the scrip, in order to raise the \$3.80 per acre to be paid to the owners (trans. pp. 351, 352). The title to the base lands could not be approved under the law until the abstracts were offered in connection with the application to select lieu lands, hence it necessarily follows that the selection of lieu lands was a part of the deal. Lieu lands, on the other hand, were only to be selected by those who purchased the scrip. It was not the intention of Mrs. Conklin or the Reddy estate to simply exchange the Monache lands for lands in other states, and the scrip could not be sold unless the purchaser was given the means for procuring title to the lands which he might select. Such means consisted of the powers of attorney to convey the lands selected to the purchaser of the scrip, or those whom he might nominate.

The placing of any of these papers in escrow would absolutely defeat or block the very purpose and object sought

to be accomplished by appellee and her co-owners. No scrip could be sold under such an agreement, and the evidence is clear and the court so found that Benson was not to pay for the land until he sold it, and the Court has also found that it was to be a scrip transaction, and the evidence will justify no other conclusion. Mr. Benson being familiar with the selling of lieu land scrip would not have proposed and would not have consented to becoming a party to an agreement which could not possibly have been carried out, hence, Campbell's and Benson's testimony to the effect that there was to be no escrow is corroborated by the strongest circumstantial evidence.

The court below resorted to the intervention of the escrow of the powers of attorney to convey, because it felt that would operate as a protection to appellee. Aside from the fact that the placing of the powers of attorney in escrow is not sustained by the testimony of any witness or the slightest evidence of any kind, it is rendered absolutely improbable from the fact that the intervention of such escrow would have defeated the purpose sought to be accomplished, viz., the sale of the scrip. The universal custom in the sale of such scrip was to deliver to the purchaser the powers of attorney to convey with the selection papers, so that if the title to the base was approved by the Government the purchaser would be protected in his selection. The decision, therefore, rests upon an assumed agreement that never existed, and which the court cannot in justice to the parties evolve from anything contained in the record.

The Assumed Irregularities in the Powers of Attorney to Convey or in the Delivery Thereof to Benson Do Not Justify Decree in Favor of Appellee.

Where the frame and texture of the bill and the gravamen of the charge is conspiracy to defraud, relief cannot be granted because of assumed defects in the powers of attorney to convey, or because the escrow holder, innocently and without the slightest intention to defraud, parted with the possession thereof. This has already been discussed, and we do not intend to consider it but briefly in this connection. We are convinced, however, that the Court has given undue importance in this case to these powers of attorney being executed in blank. Whether being so executed rendered them void or voidable or ineffectual for any reason, it could at most serve as a basis for an action in ejectment if defendant be in possession, or for a suit to remove a cloud or cancel the instruments if plaintiff be in possession.

The Court having found that powers of attorney to convey were a necessary part of the agreement to sell the scrip, there could be no fraud in securing their execution or submitting them to appellee for her signature, and in no event can fraud be charged in this case in connection with the execution or delivery of these documents; for, as we have heretofore shown, they were submitted in the most open and frank way to counsel for appellee, who could take all the time they desired to examine them; they in turn submitted them to appellee, who was left alone at her home to examine them at her leisure and confer with her friends or counsellors as to their contents or meaning. After signing them she returned them to her counsel who were not re-

stricted in their further examination of them, and they in turn sent them to Mr. Benson's office.

The testimony of Mr. Benson is clear and positive that he always understood these powers of attorney were to be executed and sent to him. He is corroborated by the universal custom prevailing in such cases and by the absolute necessity for having such documents in order to sell the scrip. Hence there was no fraud, and the statement of this Court, that Benson "fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution," receives, in our opinion, no corroboration from the record. As found by the court below, the most that can be said is that there was a mutual mistake or a failure of the minds to meet; that there was in fact no agreement, because no two persons understood it alike.

Such being the case, the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Burk v. Johnson*, 76 C. C. A. 567, 146 Fed. 209, covers the situation exactly. The Court there said:

"The gravamen of the bill is the alleged false and fraudulent representations of defendant, and the decree must be sustained, if at all, upon proof of the specific and definite fraud alleged in the bill. 'The rule that the court will only grant such relief as the plaintiff is entitled to upon the case made by the bill is most strictly enforced in those cases where plaintiff relies upon fraud. Accordingly, it has been laid down that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any

other ground.' Daniell's Ch. Pl. & Pr., Vol. 1, page 380; Eyre v. Potter, 15 How. 41, 56, 14 L. Ed. 592; Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801. Attention is called to the foregoing rule because of a claim that the decree below might be supported on proof of a mutual mistake. We do not wish to be understood as intimating that the proof shows such a mistake, but the rule is alluded to for the purpose of sharply defining the issue before us. The questions arising on this appeal will be stated as the opinion progresses."

The fact that the powers of attorney were executed in blank would not, even though the matter could be considered in this case, operate to sustain the decree below. Appellant Cobban had implied authority to insert his own name in these documents and to convey to Weirick as attorney in fact of appellee. This question is fully discussed in our former brief (pp. 49-68 of appellant's brief). In addition to the authorities there cited and the questions there discussed, we desire in this connection simply to call the Court's attention to the proposition that the record is uncontradicted that the custom in the sale of lieu land scrip was to handle the matter in the very same manner that was followed in this case; that is to say, the papers furnished to Mr. Cobban when he paid for the scrip were the kind and of the form universally and customarily furnished in the purchase of such scrip. (See testimony of Cobban, pp. 261-262.)

In determining the apparent authority of an agent, consideration must be given to the custom prevailing in the business transacted by the agent. The Supreme Court of Oregon, in *Durkee v. Carr*, 38 Ore. 189, 63 Pac. 117, states the rule clearly. The Court there says:

"The rule is elementary and universal that every grant of power by a principal to his agent, where no limitations are apparent, is to be construed as carrying with it as an incident thereto, the authority to do all things proper, usual, necessary, and reasonable to carry into effect the objects and purposes sought to be accomplished by the authority conferred."

In 1 Am. & Eng. Encyc. of Law, 996, 997, the rule is stated thus:

"Parties in entering into contracts are presumed to have in view the established usages and customs of the particular trade or business with reference to which they are contracting. Third persons in dealing with an agent have a right, therefore, to presume that he has been clothed with all the powers with which, *according to the custom of that particular business, similar agents are clothed*; and the usages of the business are properly admitted for the purpose of interpreting the powers given the agent. (Our italics.)

"The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual and necessary to carry into effect the principal power. And this applies as well to special as general agents, unless the manner of doing the particular act is prescribed by the power."

In 2 Am. & Eng. Ency. of *Law & Practice*, 970, the same rule is stated, and in addition thereto it is there said:

"That he has authority to adopt the usual and ordinary means of accomplishing the business with which he is intrusted, unless such implied authority is expressly negatived by the principal."

In this case the custom was to furnish the purchaser

powers of attorney in blank, and for the purchaser to insert his own name or the name of his agent or nominee as the attorney in fact, and to insert the description of the land which he desired to select or convey, as the case might be. For what purpose could a scrip agent be presumed to have possession of the powers of attorney to convey if he has no authority to fill in the blanks?

We submit there can be no merit in the contention that Cobban did not have implied authority to do what was done by him in this case.

The proposition that the escrow holder violated the escrow instructions is, for the reasons heretofore stated, a matter that cannot be considered in this case. There was no fraud on the part of Benson in procuring the possession of the powers of attorney or any other papers, and the lower court did not base its decree on that ground. It based it upon the technical proposition that as a matter of law a deed delivered by an escrow holder in violation of his instructions, regardless of the motive, was inoperative and void. We insisted before and we still insist that the court cannot base its decree on that ground, after it has found that there was no conspiracy to defraud. But we further insist that if the proposition could be considered in this case, the court would still be wrong, and this for two good and sufficient reasons:

First. The assumed escrow agreement under which the court decides this proposition is not the agreement of the parties. This, we think, we have heretofore sufficiently shown.

Second. The cases cited by the court in support of the proposition are by no means controlling. It will appear upon examination that in those cases there were other good and sufficient grounds for sustaining the decision; that the alleged bona fide purchaser had actual or constructive notice of defects in the papers or in the title. We submit that there is no modern authority, where the recording laws have been taken into consideration, supporting the proposition that, where a purchaser purchases a tract of land without any actual or constructive notice of defects in the title, and where the grantor is in possession of the property, paying and having paid the taxes thereon during preceding years, and surrounded by all the *indicia* of ownership, he will not be protected by the court from the claim of a person that a deed in the chain of title had been carelessly or otherwise delivered by his escrow agent in violation of his instructions. Such doctrine sets at nought the recording acts of the State. The records can no longer be relied upon by a purchaser. He is at the mercy of all grantors appearing in the chain of title. They may at any time set up the claim that their deeds had been taken out of escrow without a full compliance with the instructions. This doctrine would afford fruitful opportunities for unscrupulous persons to defraud the last purchaser.

There can be no good reason assigned why a grantor, who selects an escrow agent to deliver his deed, should not, as between himself and an innocent purchaser, bear the loss if the agent proves unfaithful or untrustworthy. (See authorities cited, pp. 80-90 of appellants' brief.)

What was said by the Supreme Court of Wisconsin in

Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486, relative to a decision of Chief Justice Marshall in United States v. Nelson, 2 Brock, 64, on the question of filling in blanks, applies with equal force to the proposition that an innocent purchaser for value must be sacrificed for the careless grantor who has selected an incompetent or unfaithful escrow agent. The court said:

“They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away.”

That the appellant, Payette Lumber and Manufacturing Company, was a purchaser for value without notice and entitled to the protection of the court, is fully discussed at pages 68 to 80 of appellant's brief, and we think it is unnecessary to add anything to what was there said.

This Case Cannot Be Distinguished From Conklin v. Benson, 159 Cal. 785, 116 Pac. 34.

The court below attempted to distinguish the decision of the California Supreme Court in Conklin v. Benson, *supra*. It says (trans. p. 509):

“In that case it was found that when the powers of attorney were, by Benson, delivered to the purchaser, they were complete, and the inference is drawn that they were in that condition when they left the plaintiff's hands. Here it is conceded that when the plaintiff signed the instruments, and indeed until some time after they were delivered to Cobban, they were blank, at least as to the name of the person authorized to exercise the specified powers.”

We may add that in the respect mentioned, the California

case differs from the case at bar, but there can be no just claim made that there is any other difference between the cases. The distinction mentioned above between the two cases cannot, for the reasons heretofore stated, affect the decision in this case.

The other distinctions which the District Court attempts to make rest upon a pure conjecture as to what the record showed in the California case and on the assumption that appellee, Campbell and Benson, had testified differently in that case from what they did here. It is submitted that there is no foundation in the record for any other distinction between the California case and the case at bar than that which pertains to the blanks in the powers of attorney.

WHEREFORE, your petitioners respectfully submit that a rehearing should be granted in this cause, for this Court has clearly misapprehended the grounds upon which the district court based its decree, and it has erroneously assumed that appellants waived in the trial court the question which they had no opportunity to present until they reached this court, and it has decided the cause upon the violation of an assumed contract, which is not the contract of the parties, and which in no event is before the Court in a suit on a conspiracy to defraud.

Respectfully submitted,

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Petitioners.

I, Oliver O. Haga, of counsel for petitioners above named,

do hereby certify that in my judgment, the foregoing petition is well founded, and that it is not interposed for delay.

Oliver A. Hagar

*Solicitor and of Counsel for Petitioners R. M. Cobban, E.
B. Weirick and Payette Lumber and Manufacturing
Company.*

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

R. M. COBBAN, E. B. WEIRICK,
Individually, and also as Trustee,
and THE PAYETTE LUMBER
AND MANUFACTURING
COMPANY, a Corporation,

Appellants,

vs.

MOLLIE CONKLIN,

Appellee.

No. 2236.

PETITION FOR REHEARING

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

*To the Honorable, the United States Circuit Court of
Appeals, for the Ninth Circuit:*

Leave of court having been first had and obtained,
we, as friends of the court interested in another action
that may be affected by the judgment in this case, hereby
petition your Honorable Court to grant a rehearing of
said cause for the reasons hereinafter set forth:

By her bill complainant claims to be the owner of an undivided one-half interest in certain real property situate in the State of Idaho, referred to as "lieu lands," (Trans., page 3) and bases her claim on allegations in substance as follows: That she owned an undivided one-half interest in certain lands situated in California, referred to as "base lands," (Trans., page 7), and which she had agreed to sell to John A. Benson for the sum of Four (\$4.00) Dollars per acre, and to execute deeds therefor in favor of said Benson, to be placed in escrow, and thereafter to be delivered to Benson upon payment of the purchase price (Trans., page 12). That, in reliance upon certain false and fraudulent representations of her attorney, Joseph C. Campbell, and of said Benson, she signed certain instruments, believing them to be deeds to Benson to be placed in escrow in accordance with the agreement (Trans., page 14), but which in fact proved to be deeds conveying the "base lands" to the United States, applications to select "lieu lands" in place thereof, and powers of attorney to convey the "lieu lands," in which powers of attorney the names of the donees of the powers were left blank (Trans., page 17). That, at the time these papers were sent to her for her signature, she did not examine them, believing and relying upon the representations and promises of Benson and Campbell, and on that account she signed all the papers without examination, believing them to be the deeds drawn in accordance with the agreement, and returned these papers, so signed, to Campbell, believing that he would place, or cause the same to be

placed, in escrow, and wholly protect her interest (Trans., pages 16 and 17), but that said Campbell delivered same to Benson contrary to the agreement. (Trans., pages 15 and 16.) That said Campbell and Benson had conspired with defendant Cobban and his associates to so induce complainant to surrender said "base lands" to the United States and thereby obtain and dispose of said "lieu lands" (Trans., pages 11 and 12), and that said Campbell wrongfully and fraudulently, and in furtherance of said conspiracy, made the representations aforesaid to said complainant (Trans., page 15), and that she did not knowingly sign, or authorize any person for her to sign, said alleged powers of attorney, and that they, and each of them, were made wholly without complainant's knowledge or consent, and are false and forged (Trans., pages 28 and 29), and that complainant remained in total ignorance of the true facts, and all the time believed that the deeds she had signed conveyed the "base lands" to Benson, and had been placed in escrow, until a short time before the action was commenced (Trans., page 18).

The Bill of Complaint further alleges that complainants have received only a portion of the purchase price (Trans., page 35), and that the "base lands" were in fact surrendered to the United States and the "lieu lands" patented by the United States in the name of said complainant and her co-owners of the "base lands" (Trans., pages 33 and 34), and that thereafter said Cobban executed a conveyance of said "lieu lands" in the name of said patentees, by himself as attorney in

fact (Trans., page 30), and that the other defendants claim under this deed.

The trial court determined and decreed that these powers of attorney were void, and that no title was conveyed by Cobban under said powers of attorney, and as a condition to requiring the complainant to execute a conveyance to defendants determined that defendants must pay to complainant the balance of the purchase price unpaid to her by Benson (Trans., page 522, et seq.). The decree of the trial court was affirmed by this court on appeal.

In our opinion the judgment rendered by the trial court and affirmed by this court on appeal should be reversed for the following reasons:

(1) Certain jurisdictional facts were alleged and not proved;

(2) Question of delivery of Powers of Attorney is a false issue in this proceeding;

(3) Moreover, the Powers of Attorney were legally executed and delivered by complainant, and conveyances made thereunder by Cobban are binding on complainant.

JURISDICTIONAL FACTS ALLEGED, BUT NOT PROVED.

The trial court, in its decision, expressly found that there is no basis for a suspicion even that Cobban and his associates purported to defraud or consciously participated in any scheme to defraud either the United States or complainant; that they had purchased the scrip by mail in the usual course of business and were not acquainted with either Benson or Campbell, and

had no knowledge of the facts complained of by complainant (Trans., page 499).

As the allegations of fraud and conspiracy set forth in the complaint were not proved, we must consider the sufficiency of complainant's alleged cause of action as if no such allegations had been made, and so considered, the complaint would be in form an action to quiet title, and would not state a cause of action within the jurisdiction of a court of equity, because it is not alleged therein that plaintiffs are in possession of the property involved in the action, and this is a necessary allegation in a suit to quiet title in the United States courts. It follows, therefore, that proof of the allegations of fraud set forth in the complaint was necessary to sustain the jurisdiction of the court.

In answer to a similar contention, Justice Gilbert in his decision states as follows:

"But the fraud of Benson was proven, and it was the proof of his fraud which justified the decree. Benson fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution. There is no evidence that the appellee knowingly and intentionally executed those papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did. If such had been the case, she would have no standing in a court of equity to complain of Cobban's act of inserting names and descriptions in the blanks. But the findings of the lower court, while they fall short of sustaining all

the charges of fraud, found fraud sufficient whereon to rest the decree. It was not necessary that the defendants should have participated in Benson's fraud. It was enough that they derived their title through it. The decree, therefore, is not inconsistent with the frame and theory of the bill, and it does not rest on a ground entirely distinct from that which the bill presents."

We agree that Benson's acts may properly be considered in evidence as bearing on the question as to whether or not the powers of attorney were voluntarily executed, and delivered by plaintiff. That would be equally true if this were an action at law. But we respectfully contend that the acts of Benson, whether fraudulent or not, cannot be set forth as a cause of action, whether at law or in equity, against Cobban and his associates who had no knowledge and were admittedly not parties to the fraud. It may not be improper to set forth these acts of Benson in the bill of complaint, but unless it is shown by proper allegations and proof that defendants were parties to the fraud, the recital of these acts in the complaint would be mere matters of inducement, and not the ultimate facts, or the necessary allegations upon which the complaint is predicated.

In other words, a complaint to set aside a deed executed in the name of plaintiff by a person who purported to act under a void or voidable power of attorney is sufficient, if it alleges the ultimate facts, namely—that the said power of attorney was not executed or de-

livered by plaintiff. And it is not necessary to allege the fraudulent acts of a third person to explain these ultimate facts. Any such allegations of fraud are mere matters of inducement and do not constitute the cause of action.

We submit, therefore, that in the present case the acts of Benson, even if shown to have been fraudulent, do not justify a decree based upon fraud. At most it can only justify a decree based upon the other ground stated in the decision, namely—nondelivery of the powers of attorney, and upon this ground alone the court would not have jurisdiction in the present case for the reasons above stated. We contend therefore, that proof of the alleged fraud of Cobban and his associates was necessary to sustain the jurisdiction of the court in the present action.

DELIVERY OF POWERS OF ATTORNEY NOT AN ISSUE IN THIS PROCEEDING.

But apart from the question of jurisdiction, complainant cannot, consistently with her own claim, deny the validity of these powers of attorneys, whether Benson acted fraudulently or honestly.

Plaintiff might have consistently claimed to be still the owner of the "base lands" on the ground that the deeds to the government were not executed and delivered as her voluntary act and were therefore inoperative to convey title. But plaintiff does not claim to own the "base lands." On the contrary, she alleges that she is the owner of the "lieu lands," and commenced

this action to quiet her title thereto. She thereby affirms and recognizes the validity of the deeds to the Government, and the other papers which the Land Department considered sufficient to constitute a surrender of the "base lands," and a selection of other lands in lieu thereof, in accordance with the act of Congress authorizing the exchange of lands situated within the forest reservation for lands situated elsewhere.

It stands admitted, however, both by the allegations of the complaint above referred to, and by the complainant's own testimony that these same powers of attorney to convey, which plaintiff claims to be false and forged, and which the court found were inoperative by reason of nondelivery, had been signed by and received from plaintiff at the same time or times, under the same circumstances, and as part of the same transaction, and together with the deeds conveying the base lands to the United States, and the other papers which passed to the Government in effecting the exchange. (Trans., pages 127-135.)

It would seem, therefore, that if these powers of attorney were inoperative by reason of the fact that they were not executed and delivered as the voluntary act of plaintiff, so also the deeds to the Government are inoperative, and for the same reason. As all these instruments came into existence together, and as part of the same transaction, so must they all stand or fall together. If all these instruments are inoperative, complainant is still the owner of the "base lands," and the United States is still the owner in equity of the "lieu lands"

which were patented in reliance upon and in consideration of the deeds purporting to surrender the "base lands" to the United States. If, on the other hand, all these instruments are operative, then the "lieu lands" were lawfully patented upon the surrender of the "base lands," and were lawfully conveyed by Cobban acting under valid powers of attorney. There can be no middle ground. All these instruments were either executed and delivered, and therefore valid, or none were executed or delivered, and therefore all are invalid. In either event, plaintiff is not entitled to any relief in this action.

These observations we submit are true, whether it be considered that these instruments are absolutely void and incapable of ratification or only voidable and capable of ratification. If only voidable, they could be ratified, but not in part. It was all one transaction, and the complainant cannot ratify the part that was beneficial to her and repudiate the part that is to her disadvantage.

The trial court does not definitely determine whether or not the instruments signed by complainant were the instruments called for by the agreement. In this regard the evidence is conflicting, and the court says:

"The truth probably is that, upon the one side, the plaintiff, not being familiar with the procedure by which base lands are exchanged for lieu lands, gave little attention to, and did not understand, such explanations as may have been made by Benson, and went away with the impression only that

Benson was to purchase, and that she was to deed to him directly, her interest in the base lands. Upon the other hand, Benson, being advised of the conditions under which base lands could be handled and exchanged, and being familiar with the procedure, understood that the owners would execute, and, in due time, deliver such papers as were necessary to make the exchange and transfer. The plaintiff wanted to sell the lands and was interested particularly in procuring the desired price. Being concerned only with the ultimate result, she probably gave very little thought to the means by which that result would be reached. In view of the entire record, it is wholly improbable, and I am unable to conclude, that Benson agreed or that he understood, that he would directly purchase the base lands, or that deeds from the then owners were to convey the title to him personally." (Trans., pages 492, 493.)

But whether the facts are as claimed by the plaintiff, or as urged by the defense, it is evident that there was only one transaction, and it is immaterial whether the papers which plaintiff signed were only deeds, or deeds, and powers of attorney also. In either event, if complainant were not bound by the transaction, she could have repudiated all the instruments, and on the other hand, when she elected to affirm, she must have affirmed the transaction in its entirety. As these deeds and powers of attorney came into existence at the same time and as part of the same transaction, they must stand or fall together. If the transaction is ratified, the instru-

ments are all valid. If the transaction is repudiated, all are invalid.

Complainant could not have repudiated the deeds and claimed the "base lands" as against the government, and at the same time have ratified the powers of attorney so that the government could not recover the "lieu lands" from Cobban and his associates. Neither can complainant ratify the deeds and claim that the "lieu lands" were legally patented in her name, and at the same time repudiate these powers of attorney which passed at the same time so as to claim that the conveyance to Cobban and his associates is void.

In this action the trial court decided that the government was not entitled to the "lieu lands." It also decided that plaintiff was the owner of these "lieu lands" as claimed by her, and the trial court rests its decision in this respect expressly upon the ground of ratification.

In this connection, the trial court states:

"This suit is based upon the theory that the plaintiff is entitled to the fruits of the exchange, namely, the lands patented to her by the United States in consideration of her relinquishment of title to the base lands, and therefore it may be held that by prosecuting the suit, the plaintiff has ratified all proceedings relating to such exchange."
(Trans. page 501.)

However, the trial court disregards the fact that the deeds to the Government and the powers of attorney to convey came into existence together, and were signed and sent forth by plaintiff under the same circumstances

and as part of the same transaction, and that therefore they must be ratified or repudiated in entirety. In this connection the court said:

“There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney to convey without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense, whether the understanding was a transfer directly to Benson of the Monache lands or an exchange thereof with the government, and thereupon a transfer of the lieu lands to Benson or such person as Benson might designate, according to all of the testimony payment of the agreed price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title from the plaintiff.” (Trans., page 501.)

We respectfully submit, however, that if, as stated by the court, payment of the purchase price was to precede the delivery of the instruments effecting a transfer of the title, plaintiff should not voluntarily have ratified the deeds to the government, as she must necessarily have done by claiming ownership of the “lieu lands,” and that having voluntarily and with knowledge of all the facts prosecuted her claim to the “lieu lands,” plaintiff thereby has ratified the entire transaction, and the validity of the powers of attorney cannot any longer be by her denied. Her remedy now is to recover the unpaid portion of the purchase price from Benson, the person with whom she dealt. It is admitted by the rec-

ord that Cobban and his associates have already paid to Benson the full purchase price of the property. (Trans., page 497.)

Moreover, it is important not to lose sight of the fact that in this action complainant is attempting to recover, not the property alleged to have been wrongfully obtained from her, but the proceeds of said property.

In any event under the facts found in this case, plaintiff would not be entitled to these proceeds—"the fruits of the exchange" as against these defendants. It may be conceded that she could have recovered against Benson, as constructive trustee, the proceeds of the property in his possession. But on the theory of a constructive trust plaintiff cannot reach beyond Benson and claim proceeds in the hands of Cobban and his associates who are not parties to the fraud of Benson, and who in good faith purchased and paid a valuable consideration for the "scrip" which constituted the complete *indicia* of ownership to the lands in controversy.

As pointed out by the trial court, Benson was not the agent of either the plaintiff, or of defendants Cobban and his associates.

"In his transaction with Cobban he was the vender, and in his relations with plaintiff he was the vendee, or purchaser." (Trans., page 511.)

Although different in form, the transaction is in legal effect no more favorable to complainant than if Benson had been the grantee named in the deeds conveying the "base lands" and had received the same out of

escrow contrary to the agreement and had exchanged them for other lands which he had subsequently conveyed to defendant Cobban and his associates. In that case it could not be doubted that so long as Benson retained the title of the property received in exchange he would be a constructive trustee thereof for plaintiff. But, and it is important to note, that even as against Benson plaintiff's right to the property so received in exchange is only an equitable right. In this, it differs from her right to pursue and claim the original property—that is a legal right based upon the fact of non-delivery. Complainant has, however, no legal right to the property received in exchange.

Her claim to this property is not based on non-delivery of the original deeds, but on the fact that the original deeds did operate to convey her title to the original property, and that by reason thereof she is entitled to recover the proceeds. It is therefore an equitable right founded on the fact that by ratification or otherwise the original deeds were operative. Therefore, even in an action against Benson to recover the property received by him in exchange, as in the supposed case, the question of delivery of the original deeds would be a false issue.

So in the supposed case, as also in the case now under consideration, complainant's right to recover the property so received in exchange after it has passed to Cobban and his associates must necessarily be an equitable right, and in these cases also the question of delivery or non-delivery of the original deeds must necessarily be a

false issue. Neither can the fact that the alleged powers of attorney were separate from the deeds operate to the prejudice of the defendants or change the legal or equitable rights of the parties. These deeds and powers of attorney all passed together as part of the same transaction, and as the trial court expressly found, the mere formalities of the transaction are immaterial.

“So also it is thought not to be highly important to determine whether, by the original agreement, it was contemplated that title to the base lands should be conveyed directly to Benson, as is asserted by the plaintiff, or was to be relinquished to the United States substantially in the manner testified to by Benson and Campbell. In either view, the plaintiff must have understood that, for a certain specified price, she was to alienate all of her interest in the lands, and, that being the case, the mere fact that the conveyances ran to the United States, and not to Benson, in itself furnishes no adequate ground for the interposition of a court of equity. *United States vs. Conklin*, 169 Fed. 177; affirmed, 177 Fed. 55. *Conklin vs. Benson* (Cal.), 159 Cal. 785, 116 Pac. 34.” (Trans., page 499.)

Complainant, therefore, cannot rely upon non-delivery of either the deeds or the powers of attorney, but in order to recover against these defendants she must rely solely on her equities.

As above pointed out, defendants Cobban and his associates were not parties to the fraud of Benson, and they have paid to Benson the full purchase price of said

property. These defendants as bona fide purchasers are protected against these mere equities existing in favor of plaintiff because they purchased without notice, except such notice as they may be charged with by reason of the fact that these powers of attorney came into the possession of defendant Cobban with the names of the donees left blank. However, it was shown by the evidence that this was in accordance with the usual custom adopted upon the sale of "scrip," and at any rate, this does not operate to excuse complainant from the consequences of her careless acts.

It was by reason of the initial carelessness of the complainant that one of two innocent persons must now suffer. Defendants are therefore protected by the equitable principle that "wherever one of two innocent persons suffer loss on account of the wrongful act of a third, he who has enabled the third person to occasion the loss must be the person to suffer." Moreover, plaintiff cannot recover against defendants on equitable grounds without showing a superior equity. This she has not done because it stands admitted under the facts of this case that defendant Cobban and his associates are as innocent of any wrong doing as plaintiff herself, and moreover that they have already paid the full purchase price for the lands.

THE POWERS OF ATTORNEY WERE LEGALLY EXECUTED
AND DELIVERED.

The trial court determined that there had been no legal delivery of the powers of attorney, and for this

reason adjudged the deeds executed by virtue of said powers of attorney to be void. On this ground also the judgment was affirmed by this court on appeal.

When we consider the painstaking manner in which the trial judge in his decision considered and weighed the evidence we are convinced that his determination of the questions involved must have great weight with this court. However, we think the trial court erred in determining that there was no valid delivery of these powers of attorney under the circumstances shown by this case, and that the court's determination of this fact is rather a conclusion from other facts than an independent finding of fact.

We are confirmed in this belief by the language of the decision itself in which it is admitted that the evidence in reference to the execution of these instruments is "very fragmentary and very unsatisfactory." (Trans., page 494.)

In this connection we quote further from the decision as follows:

"Subsequently from time to time, but under just what circumstances or how often or when it does not appear, these papers came to Benson's hands, and they now appear to have consisted of a large number of deeds conveying the base lands to the United States, and an equal number of applications signed by the owners of the base lands for the selection of lieu lands, a like number of instruments empowering some undesignated person to make selections of lieu lands, and also an equal number conferring upon designated persons irrevocable

authority to convey the title or titles of the lieu lands to purchasers thereof." (Trans., page 495.)

Therefore, by the language of the decision it sufficiently appears that there is no evidence in the record which definitely shows that these instruments were not delivered, and as the instruments did in fact come into the possession of Benson and were by him delivered to Cobban himself, a *bona fide* purchaser, and who in reliance upon the validity of these powers of attorney executed conveyance to other *bona fide* purchasers, we think complainant should not be allowed to show a failure of delivery without the production of strong testimony in that behalf.

As the evidence shows without doubt that there was in fact a physical delivery of these papers, in our judgment the burden of proving that there was not a legal delivery is upon the complainant, and that therefore the unsatisfactory state of the testimony to which the trial judge refers is fatal to complainant's case because it is not sufficient to show non-delivery.

The following quotation from the decision will, we think, show that the trial judge based his determination that there was no delivery on the ground that complainant thought that the messenger who received the papers from her came from the office of Campbell, and that she thought Campbell was her attorney, and that he would protect her interests in accordance with the original agreement, which, according to her belief, was that the papers signed by her would be placed in escrow. In this connection the court states:

"The delivery was made either by the Notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertance, it was not in accordance with the original agreement, and had the authorization or consent of neither Campbell nor the plaintiff. . . . In the third place, whatever may have been Campbell's authority, he did not knowingly deliver the instruments. In some unexplained manner they came into Benson's possession without Campbell's knowledge or consent. Campbell's positive disclaimer of knowledge is corroborated by the facts and circumstances of the case. . . . Whether Benson procured the papers by deception or through the inadvertence of the clerks in Campbell's office, his acceptance and use of them constituted a fraud upon the plaintiff's rights. There was no legal delivery of the instruments either by the plaintiff or by her agent." (Trans., pages 502, 516, 517.)

In this connection, also, it is important to notice that the trial court determined that Campbell never saw these powers of attorney, or in fact knew that they were to be executed; also that it was not Campbell's understanding of the original agreement that the papers which complainant executed were to be delivered in escrow; and also that Campbell did not understand that he was acting as complainant's attorney. (Trans., pages 493, 502, 513.)

It appears, therefore, from the facts found and relied upon by the trial judge that complainant's complete claim of non-execution and non-delivery of these in-

struments rests upon her own negligence and careless acts.

According to her own testimony complainant signed a great number of papers which she thought were deeds to Benson but which in fact were deeds to the Government of the United States, and did not purport to be deeds to Benson, and the name of Benson did not appear in any one of them. According to her own testimony also she handed these instruments so signed by her to a messenger without any instructions, believing that they would find their way to the proper depository, and that her interests would be protected. These instruments were in fact delivered into the possession of the beneficiary—by whom, at what time, or in what manner it does not appear, but—presumably by the messenger, and there is nothing to show that the messenger acted contrary to his instructions. In this case, therefore, complainant by her own careless acts did in fact execute and did in fact deliver the papers handed to her, by the messenger, and for that reason this is not a case where the law in reference to a delivery in escrow has any application whatever.

The trial court impliedly decides that complainant cannot rely upon her own careless acts to defeat her own signature, but nevertheless fails to observe that for the same reason she cannot rely on her own careless acts to defeat her own delivery. In this connection the decision reads as follows:

“It is true, I think, that when she signed the large number of documents sent to her from Campbell’s office, the plaintiff acted without fully understanding their legal import, but even if it be held that having voluntarily attached her signature she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly, nor impliedly, did she authorize their delivery to Benson.” (Trans., page 502.)

But we respectfully contend that unless a mere secret, unexpressed intention of a grantor can defeat delivery of an instrument, there was a delivery in this case. Complainant says she thought the instruments brought to her by a messenger were deeds to Benson which the messenger delivered to Campbell to be placed in escrow in accordance with her understanding of the agreement. She did not take the precaution either to examine the instruments or to inquire or direct to whom they would be delivered by the messenger. After the instruments had passed into the hands of innocent third persons she discovers that these instruments which she signed were not the deeds which she had supposed them to be, also that the messenger did not deliver them, as she supposed he would do, to Campbell, whom she supposed was her attorney, and whom she further supposed would protect her interests.

But if the facts show, (and the facts do so show) that complainant was so careless as not to read what she was signing, she will nevertheless be bound by her signature as her voluntary act, notwithstanding the fact that

she did not know the contents of the instruments, and even although she supposed them to be something different. This has been effectively decided by the Supreme Court of this State in another branch of this same litigation, in which complainant was a party—*Conklin v. Benson*, (above cited).

So also, and for the same reason, if the facts show, (and they do so show) that the complainant was so careless as to deliver possession of the written instruments signed by her without directing to whom they were to be delivered, she will be bound by the delivery of these instruments to the beneficiary, even although she supposed that they were not to be so delivered. Her carelessness in both these respects is shown by her own testimony, and completely overthrows her mere legal conclusion that the instruments were not executed and delivered.

Under the facts in this case it is undoubtedly true that the surrender of the papers signed by her was as voluntary and as much in disregard of the consequences, as was her act of signing without knowledge of their contents. Indeed, if there is any reason why these instruments should not be legally operative against complainant and in favor of innocent persons, it is rather because she signed without sufficient knowledge, than that her delivery was without sufficient consent, because from her own testimony we think it fair to conclude that she was in fact willing to deliver these papers to Benson, the beneficiary. This appears by her testimony as follows:

“Q. Now Mrs. Conklin, who was to place the deeds to the Monache lands in escrow under the agreement had at the office of Campbell at the meeting in August or September?

“A. I supposed Campbell and Benson.

“Q. Was anything said—did you understand at that time that Mr. Benson was to place these deeds in escrow?

“A. Yes.” (Trans., pages 139 and 140.)

Under these circumstances surely complainant should not be allowed to show that there was not a valid delivery of these instruments.

Although it is undoubtedly true that knowledge of the contents of an instrument as well as consent to its delivery, are essential to the due execution of any writing, nevertheless, in this case, as in *Conklin v. Benson*, (above cited), careless disregard of the contents of the instrument is equivalent to knowledge as a matter of law; and for the same reason, also, the careless disregard in this case as to the disposition of the instruments is equally as a matter of law equivalent to consent to delivery. The decision in this case as it now stands, therefore, cannot be reconciled with the decision in *Conklin v. Benson* as the trial judge in his decision attempted to do.

In our opinion the facts in the case now under consideration show both a careless execution and a careless delivery, but an execution and delivery nevertheless binding upon complainant in favor of innocent third persons. In the above quoted portion of the opinion

of this court upon this appeal it is declared that if complainant had knowingly and intentionally executed these papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did, she would have no standing in a court of equity to complain of Cobban's act of inserting names and descriptions in the blanks. We contend that such is the law and we also earnestly contend that the facts in this case show that complainant signed and delivered possession of these papers without regard to the consequences, and so carelessly as to constitute knowledge and intent in law, and to preclude her from any relief in a court of equity against these defendants, who should not be made to suffer by reason of these very acts of carelessness.

Respectfully submitted,

CUSHING & CUSHING,
WM. S. McKNIGHT,
Attorneys at Law, *Amici Curiae*.

I, Charles S. Cushing, one of the above-named attorneys at law, amici curiae, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

CHARLES S. CUSHING.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, JR., as Trustee in Bankruptcy of the
Estate of BENJAMIN C. CRANDALL, Bankrupt,
Petitioner,
vs.
NELLIE M. CRANDALL, Claimant,
Respondent.

In the Matter of BENJAMIN C. CRANDALL, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Southern District
of California, Southern Division.

FILED

FEB 28 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

IN BANKRUPTCY.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

**Petition to Revise in Matters of Law an Order
Allowing Claim of Nellie M. Crandall.**

To the Honorable Judges of the United States Circuit
Court of Appeals, in and for the Ninth Circuit:

The petition of Wm. H. Moore, Jr., respectfully
represents that he is and was at all times herein
mentioned the duly elected, qualified and acting
trustee of the estate of Benjamin C. Crandall, bank-
rupt:

That on the 4th day of June, 1912, Nellie M. Cran-
dall, the wife of said bankrupt, filed a claim for
\$2,104.25 in the above-entitled matter against the
estate of her husband, the said Benjamin C. Cran-
dall, with Lynn Helm, Esq., one of the Referees in
Bankruptcy in and for the District Court of the
United States, Southern District of California,
Southern Division; a certified copy of said claim is
filed and made a part hereof, marked Exhibit No. 1.

That thereupon your petitioner, as trustee of the
estate of the said Benjamin C. Crandall, bankrupt,
entered oral objections to that portion of said claim,
the consideration of which is based upon services
rendered by said claimant to said bankrupt, on the
ground that said claimant as the wife of said bank-
rupt was not entitled to prove a claim against the

said estate for services rendered by [1*] her to her husband, while they are living together as husband and wife.

That thereafter, upon due hearing of said claim and the objections thereto, by an order of said Referee in Bankruptcy, said claim was allowed for the sum of \$1,325.00, the said sum being the amount of money loaned to said bankrupt by said claimant with interest, to which allowance your petitioner takes no exception, and said claim was disallowed by said Referee for the unpaid balance due for services rendered, by said claimant to said bankrupt. That a copy of said order of said Referee upon the claim of said Nellie M. Crandall is made a part of and included in the certificate of Referee upon review of said order hereinafter referred to. That a certified copy of said certificate of Referee upon review is made and filed as a part hereof, marked Exhibit No. 2.

That thereafter, to wit, on the 15th day of June, 1912, said claimant filed his petition with said Referee in Bankruptcy for a review by the District Judge of said order disallowing that portion of said claim which is based upon the balance due for services rendered to said bankrupt. A certified copy of said Petition for Review of said Order of said Referee is made and filed as a part hereof, and marked Exhibit No. 3.

That thereafter, and on the 22d day of June, 1912, the said Lynn Helm, Esquire, Referee in Bankruptcy as aforesaid, filed in the office of the clerk of

*Page-number appearing at foot of page of original certified Record.

said District Court, his certificate upon said Petition of said Nellie M. Crandall for review of said order, which certificate is hereinabove referred to, and a certified copy thereof attached, made and filed as a part hereof, and marked Exhibit No. 2 as aforesaid. [2]

That thereafter, said matter was duly and regularly set down for hearing before said District Court, and the said matter having been argued and duly submitted to the Honorable Olin Wellborn, Judge of said District Court, said Court entered an order reversing the order of said Referee and allowing that portion of said claim which is based upon the balance due for services rendered by said claimant to said bankrupt. That a certified copy of said order of said District Court reversing said order of said Referee is made and filed as a part hereof, marked Exhibit No. 4.

Your petitioner further says that he is aggrieved by the order of said District Court reversing the order of said Referee, and is injured thereby, and that the errors complained of consist:

First: In holding that the claimant, as the wife of said bankrupt, was entitled to prove a claim for services rendered to said bankrupt in his business while they are living together as husband and wife.

Second: In holding that the contract for services upon which said claim is based was not illegal.

Third: In holding that the contract for services upon which said claim is based was not void.

Fourth: In holding that the contract for services upon which said claim is based is not prohibited by

the public policy of the State of California.

Fifth: In holding that said bankrupt, as the husband of said claimant, was not entitled to the services of claimant without compensation therefor.

Sixth: In holding that the earnings of said claimant for services rendered to bankrupt did not constitute community property as defined by the statutes of the [3] State of California, and thereby subject to the debts of said bankrupt.

WHEREFORE, your petitioner prays that said order of said District Court be reviewed and revised in matters of law, and that said order be reversed; and for all proper relief herein.

W. T. CRAIG and
CARROLL ALLEN,

Attorneys for Wm. H. Moore, Jr., Trustee of the Estate of Benjamin C. Crandall, Bankrupt, Petitioner. [4]

Exhibit No. 1.

Certified Copy.

NOTE.

\$1275.

May 20th, 1911.

On demand after date, I promise to pay to the order of Nellie M. Crandall Twelve Hundred Seventy-five Dollars at my office, Pasadena, Cal.

\$1050.	May 3d	} Value Received.
150.	" 4	
75.	" 14	

BENJ. C. CRANDALL.

No. ——— Due ———

*In the District Court of the United States, Southern
District of California.*

IN BANKRUPTCY.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

Proof of Unsecured Debt.

At Pasadena, in said Southern District of California, on the 3d day of June, A. D. 1912, came Nellie M. Crandall, of Pasadena, in the county of Los Angeles, and State of California, and made oath and says that Benjamin C. Crandall, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said deponent in the sum of Twenty-one Hundred Four and 25/100 (\$2104.25) Dollars; that the consideration of said debt is as follows: Balance due for wages as clerk in the store of bankrupt, in the city of Pasadena, from October 10, 1911, to January 11, 1912, continuously, exclusive of Sundays and holidays, at the agreed wages of \$20.00 per week, and it was specifically agreed between bankrupt and claimant, that the claimant was to [5] receive from bankrupt the sum of \$20 each week, for her services, for her own and separate use, of which \$10 was to be drawn each week and was so drawn, and the remaining \$10 each week was to be left in the business until conditions were easier, or until the termination of said business, and that the said balance of \$10 per week so unpaid aggregates the sum of \$130 for labor so

rendered within three months next immediately preceding the filing of bankrupt's petition in this matter.

That in addition, claimant rendered services for sixty-one weeks next immediately preceding the three month period above indicated, at the rate of \$20 per week, according to the agreement above set forth, which agreement was made at the opening of bankrupt's business; that of said amount, claimant received only the sum of \$10 each week, and the remaining sum of \$10 per week for sixty-one weeks next immediately preceding the three month period above set out is now wholly due, owing and unpaid, and it was especially agreed between claimant and bankrupt that said entire wages were to be paid to claimant as her own separate property after said wages, to wit, \$10 were paid each week, the remaining half to be paid when the business was on an easier footing, or at the conclusion of said business.

That no part of said debt has been paid, except as aforesaid, nor has any note been received for said indebtedness, not for any part thereof, nor has any judgment been rendered thereon, nor are there any setoffs or counterclaims to the same, except as above stated, and that deponent has not, nor has any person by her order, or to her knowledge or belief, for her use, had or received any manner of security for said debt or debts whatever; that in addition, claimant borrowed upon the credit of her property in the city of Pasadena [6] and secured by a mortgage thereon, the sum of \$1,500, and upon the 3d day of May, 1911, loaned the bankrupt the sum of \$1,050;

on the 4th day of May, 1911, \$150, and on the 14th day of May, \$75.00, a total of \$1,275 in cash, lawful money of the United States, and received from said bankrupt on the 20th day of May, 1911, his note for said sum, which original note is hereto attached and designated as Exhibit "A," and made a part hereof; that there are no setoffs or counterclaims to said note, nor any part thereof, nor has the same or any part thereof been paid; that the entire said sum of \$1,275, together with interest at the rate of 7 per cent per annum, from May 20, 1911, to wit, Eighty-nine and 25/100 (89.25) Dollars, is now wholly due, owing and unpaid, and that deponent has not, nor has any person by her order or to her knowledge or belief, for her use, had or received any manner of security for said debt whatever.

NELLIE M. CRANDALL.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal] JAMES WHEELER MORIN,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 918. United States District Court, Southern District of California (Bankruptcy). In the Matter of Benjamin C. Crandall, Bankrupt. Proof of Secured Debt by Agent by Nellie M. Crandall for \$2,104.25. Allowed ———, 19—. ———, Referee in Bankruptcy. J. W. Morin, Attorney for Claimant, Pasadena, Cal., Dodworth Bldg. Filed June 4, 1912, at 3 o'clock P. M. Lynn Helm, Referee. Allowed June 6, 1912, for \$1,325.00. Helm, Referee. [7]

Exhibit No. 2.**[Certificate of Referee in Bankruptcy.]**

*In the District Court of the United States of the
Southern District of California, Southern Divi-
sion.*

IN BANKRUPTCY—No. 918.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

To the Hon. OLIN WELLBORN, Judge of said
Court:

I, Lynn Helm, Referee in Bankruptcy, in charge of
these proceedings do hereby certify:

That in the course of said proceedings an order was
made and entered on the 6th day of June, 1912, in
words and figures as follows: [8]

*In the District Court of the United States for the
Southern District of California, Southern Divi-
sion.*

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

**Order [of Referee] Allowing Claim of Nellie M.
Crandall.**

It appearing that Nellie M. Crandall, the wife of
said bankrupt, has filed in said court her claim
against said estate in the sum of \$2,104.25, consist-
ing of \$1,364.25, constituting cash advances made to
said bankrupt, together with interest thereon at the
rate of 7% and \$610.00, claimed as wages earned in
the store of said bankrupt within two years last past,

and \$130.00, as wages earned in the store of said bankrupt within three months prior to the bankruptcy proceedings herein, and said trustee having objected to the allowance of said claim for wages, either the general or preferred claim, on the ground that claimant, as the wife of the bankrupt was not entitled to recover a claim against her husband or his estate in bankruptcy for services rendered by her to her husband while they are living together as husband and wife, good cause appearing therefor,

IT IS ORDERED that the claim of Nellie M. Crandall, the wife of said bankrupt, for cash advances made, together with interest thereon, be and the same is hereby allowed in the sum of \$1,325.00, and the claim of said Nellie M. Crandall for wages earned both general and preferred claims, be, and the same is hereby disallowed.

Dated June 6th, 1912.

LYNN HELM,

Referee in Bankruptcy. [9]

That afterwards on the 15th day of June, 1912, Nellie M. Crandall, the creditor in said proceedings, feeling aggrieved thereat, filed a petition for review which was granted.

That so far as the order above is concerned, the evidence upon which it is based is, that Mrs. Crandall, the claimant, is the wife of the bankrupt Benjamin C. Crandall, and as such was living with him at all times during which it is alleged that he became indebted to her in that portion of the claim which is disallowed, and which was for wages alleged to have been earned by Mrs. Crandall while in the employ of

her husband, and as such, she was employed by her husband, at his place of business in the city of Pasadena, and was to have twenty dollars a week for services, ten dollars payable each week, and ten dollars to be left on account weekly until it was paid. It was not paid and was never reduced to her possession, and at the time of the filing of the petition in bankruptcy the unpaid ten dollars was still due and owing, which amounted in all to the sum of Six Hundred Dollars earned within two years last past, and One Hundred and Thirty Dollars earned within three months immediately prior to the bankruptcy proceedings, no part of which was paid by the bankrupt.

The question presented on this review is, can the wife in a bankruptcy proceedings have a claim allowed against the estate of the bankrupt for wages earned by her while they were living together, and while she was working for him, and which wages have not been reduced to the possession of the wife prior to the filing of the petition in bankruptcy? The husband, as the head of the marital community, is entitled to the service of his wife living with him. Her earnings or wages which [10] she would be otherwise entitled to constitute community property, and as such they belong to the husband, and cannot be recovered from him in the absence of a previous agreement that they should be hers or be released by him to her. There is no evidence in this case of any such previous agreement.

I hand up herewith for the information of the Judge the proof of claim of Nellie M. Crandall. The Reporter's transcript of the testimony taken on the

hearing of the objections to said claim. The objections of the trustee to said claim were oral.

Dated June 17, 1912.

LYNN HELM,
Referee in Bankruptcy.

[Endorsed]: No. 918. In the United States District Court, District of California, Southern Division. In the Matter of Benjamin C. Crandall, Bankrupt. Filed Jan. 24, 1913, *nunc pro tunc* as of June 22, 1912, at 45 min. past 1 o'clock P. M. Wm. M. Van Dyke, Clerk. C. E. Scott, Deputy. Lynn Helm, 510 Los Angeles Trust Building, Los Angeles, Cal. [11]

Exhibit No. 3.

In the District Court of the United States, Southern District of California.

IN BANKRUPTCY.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

Petition for Review [by U. S. District Court.]

To the Honorable LYNN HELM, Referee in Bankruptcy, for the Southern District of California:

Nellie M. Crandall of Pasadena, in the county of Los Angeles, in the said Southern District of California, respectfully represents to the Referee that on the 6th day of June, last past, said Referee made an order disallowing petitioner's claim, heretofore filed against said bankrupt's estate, in two particulars, to wit: Referee disallowed said Nellie M. Crandall's claim for unpaid wages earned by her in the

service of bankrupt within three months next immediately preceding the filing of bankrupt's petition in bankruptcy, in the sum of \$130.00; your petitioner respectfully urges that the same should be allowed as a preferred claim against the estate of said bankrupt, and secondly, said Referee did on the same day disallow another portion of the claim of said Nellie M. Crandall in the sum of \$610.00, unpaid wages due her on account of personal services rendered by her in the bankrupt's employ, within the period of sixty-one weeks next immediately preceding the period of three months above referred to; that the claims of petitioner are more fully set out in her Proof of Unsecured Debt on file before said Referee, to which reference is hereby made for further particulars. [12]

That your petitioner respectfully urges that the Referee erred in so much of his order disposing of petitioner's claim against said estate as refers to said claim of \$130.00, a preferred claim, and the sum of \$610.00, a general claim, and your petitioner citing this as an error, hereby asks for a review from Referee's order in reference to the said claim of \$130.00, preferred wages, and the sum of \$610.00, general claim, and no other part of his order.

Your petitioner respectfully asks that Referee forthwith certify to the Judge of the District Court of the United States, Southern District of California, the question presented by petitioner's petition in those two respects, to wit, whether a wife of a bankrupt shall be allowed a claim for unpaid wages due her for personal services performed in the employ-

ment of the bankrupt in his business, under an express agreement with him fixing the rate of said wages, which were unpaid at the time of said bankruptcy.

Dated this —— day of June, 1912.

NELLIE M. CRANDALL,

Petitioner.

By J. W. MORIN,

Her Attorney.

[Endorsed]: 918. In the District Court of the United States for the Southern District of California. In the Matter of Benjamin C. Crandall, Bankrupt. Petition for Review Original. Received Copy June 15th, 1912. W. T. Craig & Carroll Allen, Attys. for Trustee. Filed June 20, 1912, at 10 min. past 3 o'clock P. M. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy. J. W. Morin. 208 Dodworth Bldg., Pasadena, Cal., Attorney for Petitioner. Filed June 15, 1912, at 11 o'clock A. M. Lynn Helm, Referee. [13]

Exhibit No. 4.

**[Order Affirming Report of Referee and Allowing
Claim of Nellie M. Crandall.]**

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Tuesday, the fourteenth day of January, in the year of our

Lord One Thousand Nine Hundred and Thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 918—BKCY. S. D.

In re BENJAMIN C. CRANDALL,

Bankrupt.

This matter having heretofore been submitted to the Court on a review of the order of the Referee in bankruptcy disallowing the claim of Nellie M. Crandall, wife of the bankrupt, against the bankrupt's estate; the Court, having duly considered the same, and being fully advised in the premises, now reads and files its conclusions, and it is ordered that the report of the Referee herein be, and the same hereby is, disaffirmed, and that the claim of said Nellie M. Crandall be, and the same hereby is, allowed. [14]

**[Certificate of Clerk U. S. District Court to Copy of
Claim of Nellie M. Crandall, etc.]**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a true, full and correct copy of the original Claim of Nellie M. Crandall, Referee's Certificate upon Petition for Review, Petition of Nellie M. Crandall for Review of Order of Referee, Minute Order of United States District Court reversing Referee's decision; all filed of record in my office in the matter of Benjamin C. Crandall, in Bankruptcy No. 918, Southern Division.

Attest my hand and seal of said District Court
this 25th day of January, A. D. 1913.

[Seal]

WM. M. VAN DYKE,
Clerk.

By E. H. Owen,
Deputy Clerk. [15]

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

Wm. H. Moore, Jr., being duly sworn, says: That
he is the duly elected, qualified and acting Trustee
of the Estate of Benjamin C. Crandall, Bankrupt,
and the petitioner in the within entitled matter;
that he knows the contents of the foregoing Peti-
tion for Review, and the same is true as he believes.

WM. H. MOORE, Jr.

Subscribed and sworn to before me this 25th day
of January, 1913.

[Seal]

M. LUCILE ADAMS,
Notary Public in and for the County of Los Ange-
les, State of California. [16]

[Endorsed]: No. ——. The United States Cir-
cuit Court of Appeals in and for the Ninth Circuit.
In the Matter of Benjamin C. Crandall, Bankrupt.
Petition for Revision Under Section 24(b) of the
Bankruptcy Act of 1898. Received copy of the
within Petition for Revision this 25th day of
January, 1913. J. W. Morin, Attorney for Nellie
M. Crandall, Claimant. [17]

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

IN BANKRUPTCY.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

Stipulation as to Record and Facts.

IT IS HEREBY STIPULATED by and between Wm. H. Moore, Jr., Trustee of the estate of Benjamin C. Crandall, a bankrupt, the petitioner, and Nellie M. Crandall, a claimant, that the record of proceedings attached to the Petition for Revision in the above-entitled matter is a full, true and correct copy of the proceedings in the District Court of the United States, in and for the Southern District of California, Southern Division, concerning the claim of Nellie M. Crandall; that the summary of evidence contained in the Certificate of Lynn Helm, Esq., Referee, attached to said Petition for Revision and marked Exhibit No. 3, constitutes a full and correct statement of the facts relating to said claim; that the said matter may be heard, considered and determined by the United States Circuit Court of Appeals on said record.

Dated: January 24th, 1913.

W. T. CRAIG and
CARROLL ALLEN,
Attorneys for Petitioner.

J. W. MORIN,
Attorney for Claimant. [18]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. In the Matter of Benjamin C. Crandall, Bankrupt. Stipulation as to Record and Facts. [19]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 918.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

**Order [of U. S. District Court] Allowing Petition
for Revision and That Clerk Prepare Record.**

WHEREAS, Wm. H. Moore, Jr., Trustee of the Estate of Benjamin C. Crandall, a bankrupt, feels aggrieved by order entered herein on the 14th day of January, 1912, and the Court being satisfied that the questions therein determined are questions of which revision may be asked, as provided in section 24(b) of the Bankrupt Act of 1898, and that the application should be granted, on motion of W. T. Craig and Carroll Allen, attorneys for said trustee,

IT IS ORDERED that the order of this Court made and entered herein on the 14th day of January, 1912, reversing the order of Lynn Helm, Esquire, Referee, which disallows that portion of the claim of Nellie M. Crandall which is founded upon a balance due for services rendered to the bankrupt, be revised in matters of law by the United States Circuit Court of Appeals in and for the Ninth Cir-

cuit, as provided by section 24(b) of the Bankrupt Act of 1898, and the rules and practice of that court; that the clerk of this court prepare, at the expense of the petitioner, a certified copy of such order and a record of this case pertinent to said order.

Dated January 25th, 1913.

OLIN WELLBORN,

United States District Judge.

WITNESS the Honorable OLIN WELLBORN, Judge of said Court, and the seal thereof, at Los Angeles, in said District, this 25th day of January, 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original Order Allowing Petition for Revision and That Clerk Prepare Record, filed January 25th, 1913, in the matter of Benjamin C. Crandall, Bankrupt, No. 918, Southern Division, as the same remains on file and of record in my office.

Attest my hand and seal of said District Court this 25th day of January, A. D. 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By E. H. Owen,

Deputy Clerk.

[Endorsed]: No. 918. In United States District Court, Southern District of California, Southern Division. In the Matter of Benjamin C. Crandall, Bankrupt. Certified Copy of Order Allowing Petition for Revision and That Clerk Prepare Record. Filed Jan. 25, 1913, at 25 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. C. E. Scott, Deputy.
[20]

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

IN BANKRUPTCY.

In the Matter of BENJAMIN C. CRANDALL,
Bankrupt.

Notice of Filing Petition for Revision.

To Nellie M. Crandall, Claimant, and to J. W. Morin,
Her Attorney:

You are hereby notified that on the 29th day of January, 1913, we will file in the clerk's office of the United States Circuit Court of Appeals, in and for the Ninth Circuit, in the city of San Francisco, California, a Petition for Revision of the Order of the United States District Court, Southern District of California, Southern Division, made and entered on the 14th day of January, 1913, reversing the order of the Referee in the matter of the claim of Nellie M. Crandall, a copy of which said Petition for Revision is served herewith. We will then ask to have said cause docketed and the necessary order made

thereon to have such cause set down for hearing.

Respectfully yours,

W. T. CRAIG and

CARROLL ALLEN,

Attorneys for Petitioner. [21]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. In the Matter of Benjamin C. Crandall, Bankrupt. Notice of Filing Petition for Revision. I hereby accept service of the above notice this 25th day of January, 1913. J. W. Morin, Attorney for Nellie M. Crandall, Claimant. [22]

[Endorsed]: No. 2245. United States Circuit Court of Appeals for the Ninth Circuit. Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Benjamin C. Crandall, Bankrupt, Petitioner, vs. Nellie M. Crandall, Claimant, Respondent. In the Matter of Benjamin C. Crandall, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Southern District of California, Southern Division.

Filed January 29, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2245.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In re
BENJAMIN C. CRANDALL,
A Bankrupt.

Wm. H. Moore, Jr., Trustee,
Petitioner,

vs.

Nellie M. Crandall,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This case comes before this court upon the petition for a revision of a certain order of the United States District Court for the Southern Division of the Southern District of California disaffirming an order of the referee in bankruptcy disallowing a claim for \$740.00 presented by Nellie M. Crandall against the estate of her husband for wages performed by her for her husband as a clerk in his store in the city of Pasadena. Of this amount \$130.00 is claimed as preferred and the balance as a general claim against the estate.

The claim admits that the wife had been paid \$610.00 as wages and the claim is presented as a balance due.

The matter comes before this court on petition for revision, but if it should be required that it be presented by appeal then the attention of the court is called to the fact that the petition was filed within the time allowed for appeal, that the record contains all the matters which a record on appeal would contain, and the stipulation of the respective counsel [Trans. p. 16] recites "that the said matter may be *heard*, *considered* and *determined* by the United States Circuit Court of Appeals on said record." For the purpose of the hearing the matter may, therefore, be considered by this court as an appeal.

Nellie M. Crandall, the claimant, is the wife of the bankrupt, and as such was living with him at all the times it is alleged that he became indebted to her for wages. She was employed by her husband at his place of business and was to have \$20.00 per week for her services, \$10.00 payable each week and \$10.00 to be left on account weekly until it was paid. It was not paid and was never reduced to her possession, and at the time of the filing of the petition in bankruptcy the unpaid \$10.00 per week was still due and owing. There was no agreement that these wages should be hers or be released by him to her. [Tr. p. 10.] The claim was disallowed by the referee, Honorable Lynn Helm, and was ordered allowed by United States District Judge, Honorable Olin Wellborn. One hundred and thirty dollars was allowed as a prior claim and six hundred and ten dollars was allowed as a general claim against the estate.

The question involved in this case is whether a contract made by a husband with his wife to pay her wages for working in his place of business, while she is not living separate and apart from him and there being no contract between them that these wages shall be her separate property, creates an indebtedness from him to her upon which she can file a claim against him in bankruptcy as a creditor of her husband.

The Errors Relied Upon for the Reversal of the Order of the District Court are as Follows:

FIRST: In holding that the claimant, as the wife of said bankrupt, was entitled to prove a claim for services rendered to said bankrupt in his business while they are living together as husband and wife.

SECOND: In holding that the contract for services upon which said claim is based was not illegal.

THIRD: In holding that the contract for services upon which said claim is based was not void.

FOURTH: In holding that the contract for services upon which said claim is based is not prohibited by the public policy of the State of California.

FIFTH: In holding that said bankrupt, as the husband of said claimant, was not entitled to the services of claimant without compensation therefor.

SIXTH: In holding that the earnings of said claimant for services rendered to bankrupt did not constitute community property as defined by the statutes of the State of California, and thereby subject to the debts of said bankrupt.

In California the Earnings of a Wife, Living with her Husband, are Community Property, in the Absence of an Express Contract Between Her and Her Husband That They Shall be Her Separate Property.

“The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as earnings received for the service of the husband; and for any wrongful act of either by which either husband or wife is deprived of the capacity to accumulate community property, the husband as the head of the community may maintain an action for damages.”

Martin v. Southern Pacific Co., 130 Cal. 285;
Beakins v. Dieterle, 5 Cal. App. 690.

“All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property.”

Civil Code, Sec. 162.

“All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.”

Civil Code, Sec. 163.

“All other property acquired after marriage by either husband or wife or both, is community property,” etc.”

Civil Code, Sec. 164.

From the foregoing provisions of the Code and citations of authorities it will be conceded, we believe, that the earnings of the husband and wife constitute community property without a question.

It has, however, been held that these earnings may be converted into separate property by agreement between the husband and wife.

Wren v. Wren, 100 Cal. 276;

Larson v. Larson, 15 Cal. App. 531.

Special attention is directed to the fact that in the case at bar no contract existed between husband and wife that the wages to be earned by her from her husband should be her separate property.

No citation of authority is necessary to the effect that all community property is liable for the payment of the community debts.

An Agreement of the Husband to Pay His Own Wife Wages Does Not Convert the Wages into Separate Property, and in California Such Wages Are Liable for the Payment of His Debts.

The entire case of this claimant rests upon a section of the Civil Code of California as follows:

“The earnings of the wife are not liable for the “debts of the husband.”

Civil Code, Sec. 168.

It must be remembered that the wages claimed by the wife were never reduced to her possession, but her claim is a mere chose in action. The allowance of the claim partly as preferred and partly as a general claim is wholly illogical. If the amount due from the hus-

band to the wife constitutes earnings as meant by section 168 of the code, and if these earnings are not subject to the debts of the husband, then the only logical thing for the court to have done was to have allowed the withdrawal from the husband's estate of the entire amount due the wife. Not, however, as a claim against the estate, but as an exemption. The referee held properly, we think, that section 168 did not create a debt, but was a statute of exemption. He held that if the wife had reduced the money to her possession and the husband had permitted her to retain it as her own it would then constitute her separate property and would be exempt from the claims of his creditors, but inasmuch as this debt due from the husband to the wife was nothing but community property, she could not maintain any action against her husband; that it would be impossible for her to enforce a claim in bankruptcy when she could not enforce such a claim in any civil action; if, therefore, she had any right to wages under section 168 it could only be because that section created in her favor a statute of exemption. The claim presented in this matter is upon a debt and is not a claim based upon an exemption.

It will be conceded that section 168 was never intended to mean that the earnings of the wife were her separate property. This is shown by the fact that the code in the following section provides when earnings of the wife should be her separate property. This section is as follows:

“The earnings and accumulations of the wife, and of
“her minor children living with her or in her custody,

“while she is living separate from her husband, are
“the separate property of the wife.”

Civil Code, Sec. 169.

The attention of the court is called to the fact that Mrs. Crandall was not living separate from her husband.

“The earnings of a wife do not become her separate
“property while she is living with her husband. They
“can only become such when she lives separate from
“him.”

Abbott v. Wetherby, 6 Wash. 507.

The case just cited construes sections 1402-1403 of the General Statutes of Washington, which are similar to sections 168 and 169 of the California Code, and the court in that case says that section 1402, providing that the earnings of the wife were not liable for the husband's debts, was “a statute of exemption and not
“of property rights.”

It is not necessary for us to go to the length of claiming that all earnings of a wife, whether performed for her husband or a third party, shall be subject to the community debts. However, in a very able note to a case in the West Coast Reporter Professor John Norton Pomeroy gave the following construction to section 168 of the Civil Code:

“The first question which arises is: what debts of
“the husband are here intended, for which her earnings are not liable? All of the debts which the husband incurs in the support and maintenance of his family, and all those which he incurs in carrying on
“any trade, business, profession, or office by which

“community property is acquired, and all those which
“he incurs in the management, increase or obtaining
“of community property, are debts of the husband, in
“the sense that he is alone the contracting party, he is
“alone personally liable, and he alone can be sued by
“the creditors. The common law still prevails in this
“state that, so far as personal liability goes, such debts
“are the debts of the husband. But since all these
“debts are incurred for the benefit of the community
“and of the community property, they are community
“debts and all community property is liable for them
“on the husband’s death, before the widow’s share of
“that property is ascertained from the residue after
“their payment. But there may be other debts of the
“husband which are his own separate and individual
“liabilities, and not community debts. For example,
“if he has a separate property, all the debts which he
“incurs in managing or protecting such property would
“be his separate debts and not community debts. The
“theory upon which the whole system of community
“property is based, is, that it is the product of the joint
“labor of both the spouses. Even where the wife con-
“tributes nothing, and the whole community property
“is the result of the husband’s business or employment,
“yet the wife’s interest is founded upon the theory that
“it was all produced by their joint labors. Upon this
“theory, it is eminently just and equitable that both
“the spouses should in some way be liable for the com-
“munity debts. As no personal liability attaches to
“the wife, this result can only be reached by making
“all community property liable for the community debts.
“In other words, it is just and equitable that all the
“community property, even though some portion of it
“consists of earnings of the wife, should be liable for
“all community debts, notwithstanding those debts are
“in a strict legal sense ‘debts of the husband.’ * * *
“If the interpretation should prevail that ‘the debts of
“the husband’ include all the community debts which
“he incurs and for which he alone is personally liable,
“as well as his own individual and separate debts; and
“that the wife’s earnings, even while living with the
“husband, continue to be free from liability for all such

“debts after they have been paid over to her and have
“become part of the community property, then such a
“case as the following would not be impossible nor even
“improbable.

“A husband and wife are living together, neither of
“them having any separate property. The wife by her
“superior energy, industry, skill and knowledge earns,
“either by her mental or physical labor, all the income
“for themselves and family. The husband, while free
“from habits of dissipation, is so deficient in activity
“and purpose that he really contributes nothing for the
“support of himself, wife and family. The earnings
“of the wife are more than enough for the maintenance
“of the household, and the surplus lies accumulated,
“and whatever may be its form, whether money, or
“land, or chattels, or things in action, it is community
“property. This husband, however inefficient he may
“be as a business man and a producer, is still the legal
“head of the family; he is legally bound to support it;
“the debts incurred for the support and maintenance
“of himself, wife and family are *his* debts, for which
“he is alone liable; all the contracts which the wife
“may make for supplies of every description furnished
“for themselves and family are his contracts made by
“her as his agent. In short, all such debts incurred
“for the benefit of the spouses and their family are ‘the
“debts of the husband,’ for which he alone can be sued.
“They are also community debts. Moreover, by the
“express terms of the code, he alone has the legal pos-
“session, control, management and power of disposition
“of this community property. The interpretation above
“described would necessarily lead to the result that in
“such a case as this all the community property would
“be completely beyond the reach of the creditors, al-
“though their demands were community debts. The
“creditors might recover personal money judgments
“against the husband on their claims, but could not
“satisfy these judgments out of community property.
“As neither spouse has any separate estate, the cred-
“itors in such a case would be without any legal rem-
“edy. * * * In order to preserve any consistency
“and congruity with the general theory of community

“property, section 168 should be construed as applying “alone to the separate individual debts of the husband “and not to his community debts; but if it does include “his community debts, then the ‘earnings of the wife’ “should not extend to sums which have been actually “paid to the wife, and thus incorporated into the mass “of community property.”

4 West Coast Reporter, 306-309. Editorial by John Norton Pomeroy.

It seems to us that section 168 of the Civil Code was passed so as to exempt the earnings of the wife from the debts incurred by the husband other than community debts.

Her earnings, being community property, would be subject to the separate debts of the husband in the absence of some statute like section 168.

“The community property is liable for debts incurred “by the husband in the management of his separate “estate.”

Spreckels v. Spreckels, 116 Cal. 339, 343.

Contracts Between Husband and Wife by Which She Is to be Paid Wages for Working for Him Are to be Strictly Construed, and Are Held Contrary to Public Policy and Void.

The old common law rule that all property acquired by the wife after marriage became that of the husband has been almost universally abrogated in the United States. The right of a wife to make contracts with respect to property has been fully established by statutes in the various states. The following is the law upon that subject in California:

“Either husband or wife may enter into any engagement or transaction with the other or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rule which control the actions of persons occupying confidential relations with each other, as defined by the title on Trusts.”

Civil Code, Sec. 158.

Inasmuch as we shall cite some decisions based upon the statute of New York as amended in 1896, we here quote it for purpose of comparison with the provision of the California code. It is as follows:

“A married woman has all the rights in respect to property, real and personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage and to relieve the husband from his liability to support his wife.”

Laws N. Y. 1896, C. 272, Sec. 21.

A careful comparison of the two statutes will indicate that the New York statute is fully as broad as that of California.

The courts of New York have repeatedly held that a contract made by a husband to pay his wife for ser-

vices rendered in his business is not enforceable because without consideration, since such services as she may render him belong to him.

Blaechinska v. Howard Mission, 130 N. Y. 497;
Whittaker v. Whittaker, 52 N. Y. 368;
Porter v. Dunn, 131 N. Y. 314;
Matter of Callister, 153 N. Y. 294.

It has been held in many other states that the fruits of the wife's labor belong to the husband and also that she cannot enforce a claim against her husband for labor performed for him.

National Bank v. Sprague, 20 N. J. Equity 13;
Clinton Station Mfg. Co. v. Hummell, 25 N. J. Equity 45;
Shaeffer v. Sheppard, 54 Alabama 244;
Hazelbaker v. Goodfellow, 64 Ill. 238;
Lee v. Savannah Guano Co., 99 Ga. 572;
Miller v. Miller, 78 Iowa 177.

"While the cases may not be entirely harmonious on the question of the husband's right under these modern statutes to the earnings of his wife for labor performed by her for third persons, the authorities are uniform that such statutes do not operate to give the wife a legal claim upon her husband or his estate for wages for performing her domestic duties as a wife, or for aiding and assisting him by her labor in any business pursuit he may be engaged in, and any promise of the husband to pay his wife for such services is without consideration and void as against the claims of his creditors."

Brittan v. Crowther, 54 Fed. 295 (C. C. A., per Caldwell, J.).

Profits and labor of the husband and wife belong to the community, and, therefore, the wife's earnings as well as those of the husband must be regarded as community property.

Pearce v. Jackson, 61 Tex. 642;

Ford v. Brooks, 35 La. Ann. 157.

Efforts have been made in various states to prove these claims against the estates of husbands in bankruptcy, but with the exception of a single case hereafter considered, the courts have held these claims not provable in bankruptcy.

"In Vermont a wife has no legal or equitable claim upon her husband for her personal services, and where in that state a joining in a deed of the family homestead in which no money of her own was invested, upon her husband's agreement to pay her regular wages for working in his fruit store and restaurant and in doing the housework, she is not entitled to prove her claim therefor against his estate in bankruptcy."

In re Trombly, 16 Am. B. R. 599.

"In Arkansas a claim under a contract to pay for a wife's services as clerk in her husband's store is not provable against his estate in bankruptcy."

In re Suckle, 176 Fed. 828.

In a recent case in New York a wife was employed by the husband in his business, for which he promised to pay her a definite reasonable sum per week and she in turn employed a servant to fulfill the domestic duties

which otherwise the wife should have done or aided in doing. The wife presented a claim against the bankruptcy estate of her husband for wages under this contract and the United States district judge disallowed the claim and in the course of the opinion said, in construing the statute of New York which has been hereinabove quoted:

“The statute obviously intends to enable the wife to contract with the husband respecting the acquisition of property, but does it enable the wife to acquire property by agreeing to render him a service outside of her domestic duties? If so, it would enable her to acquire property by contracting with him respecting her domestic service. There is a wide distinction between a power to acquire property by a contract with the husband and a power to create property which shall be her own, by an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all. In other words, a contract with the husband for the acquisition of property does not include a contract to convert her personal service to her husband into property.”

In re Kaufmann, 104 Fed. 768.

It is true that there are some cases that apparently hold to the contrary of the foregoing decisions of the bankruptcy courts, but so far as we have been able to ascertain there is only one decision allowing a claim for the wife's wages against the estate of the bankrupt husband. This case was much relied upon in the court below by the claimant. It is the case *In re Domenig*, 128 Fed. 147. The court here allowed the wife to

prove a claim for services performed in her husband's business. The facts of that case, however, are quite different from the case at bar. An examination of the case will show that the wife was living separate from her husband and he agreed to pay her wages of \$8.00 per week for working in the business, provided she would return to him, and "that it was upon the strength of the promise to pay her \$8.00 per week that she returned to him," and "that the sum of \$8.00 was to be hers, and that her husband allowed her the money needed in conducting the house in addition to the sum of \$8.00." Even in this case the court recognized the danger of these claims, and said:

"Undoubtedly contracts of this kind between husband and wife ought to be scrutinized with the utmost vigilance and should never be allowed unless the evidence is clear and convincing in every particular. Ordinarily there is little evidence to support them, except the testimony of the husband and the wife themselves, and the husband is usually interested nearly as much as the wife in favor of her claim."

The court might have added, also, that the theory that these wages belonged to the wife and did not belong to the husband, in the sense that he has not the beneficial use of them, may be a theoretical truth, but is a practical fallacy. The courts cannot shut their eyes to everyday experience. The practical effect of allowing these claims of wives for services performed for husbands is simply to take so much property away from the husband's creditors and give it back to the bankrupt.

The importance of the ruling in the case at bar arises not from the results to the creditors in the Crandall case, but it arises from the precedent which it establishes of allowing these wage claims to wives who frequently assist their husbands in their businesses and who just as frequently come into the bankruptcy courts with claims for wages in consequence of contracts made between husbands and wives in the privacy of their own apartments. Creditors are absolutely at their mercy, for there is no possible way of contradicting the testimony establishing the contract, and it may be stated to this court that there are many of these claims pending in the courts and that the question involved in this case is presented to this court for its decision in consequence of the frequent recurrence of the condition of affairs presented in the Crandall case.

Another case much relied upon by the claimant was *Roache v. Union Trust Co.*, 52 N. E. 612 (Indiana). An examination of this case will show that the services were performed for the husband under a contract that the money should be the property of the wife and that it was actually paid to her and became her separate property and was afterwards loaned to the husband. This would clearly constitute a gift to the wife and make the property her separate property under the laws of California, in the absence of any fraud on the creditors.

We believe that an analysis of many of the cases holding that the wife may present claims for wages will show special circumstances which take them out of the general rule.

In California the husband has absolute control and right of possession of the community property. Beyond all question the debt, if there is any debt, that might be due from Mr. Crandall to his wife constitutes community property. Mr. Crandall is entitled to the possession of that property. To allow a claim to a wife for this community property would simply mean that under the law of California the claim would be allowed to Mrs. Crandall, and Mr. Crandall, the bankrupt, would be entitled to the possession and use of the money. As before stated section 168 is a statute of exemptions and cannot be construed as creating a debt between husband and wife upon which any claim in bankruptcy could be predicated. And if it should be held that wages due the wife from the husband can be taken out of the bankrupt's estate, then it constitutes nothing more nor less than the right of the bankrupt to take out from his estate the amount of wages claimed to be due the wife. There can be no other logical conclusion reached, for it must be conceded that the wife cannot sue the husband for the possession or control of community property in California. It is certainly anomalous to allow a claim to be presented against a bankrupt estate, which in effect is an action to recover property, when no suit at law or in equity could be maintained in any court for the recovery of such property.

It is submitted that if section 168 of the Civil Code applies to the earnings of a wife for labor performed for her husband, that then it should only apply to those earnings that have been reduced to her possession;

that it was never intended that her right to earnings should be enforceable against property claimed by creditors; that the chose in action, if there can be such a thing where the right is not enforceable, is not what is meant by that section; that even if it were possible that a debt could thus arise from the husband to the wife, then this debt does not constitute "earnings." To hold that it does will create in California an entirely new doctrine of law. For if it be true that it does constitute earnings that are exempt, then hereafter in every attachment or execution levied against property of the husband the wife may claim her wages, the same as any other employee, in preference to execution or attaching plaintiff.

It is earnestly submitted that for all of the reasons given in the foregoing brief the claim of Mrs. Crandall should have been rejected and that the United States District Court should be reversed and the order of the referee affirmed in this matter.

W. T. CRAIG &
CARROLL ALLEN,
Attorneys for Petitioner.

No. 2245

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In re
BENJAMIN C. CRANDALL,
A Bankrupt.

Wm. H. Moore, Jr., Trustee,
Petitioner,

vs.

Nellie M. Crandall,
Respondent.

BRIEF FOR RESPONDENT.

It will be observed that in the case at bar, to-wit: the Crandall case, the wife, Nellie M. Crandall, had previously loaned out of her separate property a considerable sum of money to bankrupt [Tr. p. 8], the inference being that the same had gone to establish the business now in bankruptcy. It will be observed that the duties that Mrs. Crandall was performing in the store were in addition to the normal duties devolving upon a wife merely by virtue of the marriage status. That is, there is no contention that Mrs. Crandall neglected her household duties or that the bankrupt paid

for that work to be done and that she was simply substituting one service for another. Mrs. Crandall was simply rendering a service which a clerk must have, in any event, been paid to render, and doubtless in a more conscientious and patient manner than a hired stranger would have rendered it. There is no allegation of bad faith or unfairness in the contract between Mrs. Crandall and the bankrupt. The question is merely whether there was any difference in money earned by Mrs. Crandall under an express contract from money earned by a stranger under an express contract. If there is any force or meaning in the agreement that bankrupt should pay Mrs. Crandall \$20.00 a week for her services, it must mean that the money was to be hers. What nonsense it would be to say that Mrs. Crandall was hired at \$20.00 a week as clerk but that Crandall did not mean that she was to receive her wages. The husband is entitled to the service of the wife in normal marriage status, but the sphere of such service is thoroughly well understood. It is within the home as contrasted with the business. As far as I know, there has never been a case which decided or intimated that the husband could command the wife to render service in the business community as of right. I doubt not but that he could forbid her from so engaging herself, especially if to the neglect of her recognized duties at home, but when she does engage in such outside work, and especially upon express request of her husband, she is thereupon rendering an additional service which is a consideration at law and is a matter respecting *property* for which the promise of the husband to pay is binding.

Marlow v. Barlew, 53 Cal. 456, says that 158 C. C. has practically abrogated all the restrictions of married women to contract, and in Wren v. Wren, 100 Cal. 276, the wife may sue alone for services rendered in nursing a boarder even when she is living with her husband. Her right so to recover, is based upon the conclusion of the court that the earnings so secured are her separate property because of the fact of a general understanding between husband and wife that these earnings should be hers, and such an understanding, even as to future earnings, is valid and is an agreement respecting property. The case effectually disposes of any contention that the earnings must be reduced to enjoyment or possession by the wife in order to secure her right thereto.

In Koltschmidt v. Weber, 145 Cal. 598, the rule is the same, going to the extent that a mere understanding shown by a course of conduct between the husband and wife that her earnings shall be hers, makes them such. In Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, the rule is adopted that the earnings of the wife, including future earnings, may become her separate property by agreement between herself and husband; that circumstantial evidence of the consent is sufficient without proof of express agreement.

In reply to the trustee petitioner in this matter, respondent contends that such cases as Martin v. Southern Pacific Ry., 130 Cal. 285, and Bekins v. Dieterle, 5 Cal. 690, are inapplicable. The former involving as it does merely the question of personal injuries to the wife belonging to the husband in the absence of any

agreement or understanding existing before the injury that her earnings should be her own, and the latter case cannot fairly be cited by petitioner, because that was a plain case of Bekins and wife working up a storage business together without any agreement or understanding as to its products being her separate property, followed by a plain conveyance thereof in fraud of creditors. There are no such circumstances in the Crandall case.

In addition to sections 162, 163 and 164, respondent also wishes to call the attention of the court to sections 158, 159, 168 and 169 of the Civil Code and also to section 370 of the Code of Civil Procedure, of the state of California.

Section 158 of the Civil Code—husband and wife may make contracts: “Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transaction between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.”

Section 159 of the Civil Code: “A husband and wife cannot, by any contract with each other, alter their legal relations, except (1) as to property and except that (2) they may agree, in writing, to an immediate separation, and may (3) make provision for the support of (a) either of them and of (b) their children during separation.”

Section 168 of the Civil Code: "The earnings of the wife are not liable for the debts of the husband."

Section 169 of the Civil Code: "The earnings and accumulations of the wife and of the minor children living with her or in her custody while she is living separate and apart from her husband, are the separate property of the wife."

Section 370 of the Code of Civil Procedure: "When a married woman is a party, her husband must be joined with her, except:

"1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.

"2. When the action is between herself and her husband she may sue or be sued alone.

"3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing entered into between them, she may sue or be sued alone."

First of all to dispose of the authorities cited by the petitioner, the respondent calls attention to the fact that *Abbott v. Wetherby*, 6 Wash. 507, does not apply to the *Crandall* case, for in the *Washington* case the wife testifies: "He gave me money for the house and whatever was over was mine." That was the source of her resources and there was no contract for wages or remuneration of any sort between husband and wife. She did nothing outside the normal sphere of a wife. She simply saved from her household allowance.

Sections 1402 and 1403 of the General Statutes of Washington are not similar to any statute in force in

California in this, that they must be construed with section 1400 which says that the wife must be joined in deeds community property and section 1401 which provides that the husband and wife can only alter the status of community property by written and acknowledged agreements *to take effect on death*. Section 1411, nevertheless, provided that one may sue the other.

Sections 168 and 169 of the Civil Code of California can only be reconciled by the proposition that *in the absence of an agreement to the contrary, express or implied*, the earnings of the wife are community property and even under section 168 are within the husband's control, except where she is living separate from him, in which event they are her separate property and, of course, are beyond his control as well as that of the creditors of the husband; whereas section 168 does not state but that the earnings of the wife are nevertheless community property.

Whittaker v. Whittaker, 52 N. Y. 368, cited by petitioner, is inapplicable because it was a \$4000.00 note given by husband since deceased, to wife without consideration except love and affection, household work and assistance in farm chores.

Blaechinska v. Howard Mission, 130 N. Y. 497, was submitted on December 22d, 1891, and decided January 20th, 1892. The case, therefore, was based upon the Law of 1862 which provides merely that the earnings of the wife should be her own when "arising from her trade, business, labor or services carried on and per-

formed upon her sole and separate account." The decision was expressly placed upon the ground that the statute was not broad enough to alter the common law rule that a wife cannot collect wages from the husband. It will be observed that there is no such restriction upon the rights of married women in the California statutes. The point we wish to emphasize on behalf of respondent is that the Act of 1896, quoted by petitioner on page 13 of his brief, *was not the statutory law existing in New York at the time that the case of Blacchinska v. Howard Mission was decided.* Said case, therefore, fails to be of guidance in this jurisdiction. The statutes of New York, beginning with 1892, page 592, alter the Law of 1862 by making valid contracts of the wife in regard to property "with any person including her husband," and making the wife capable of "carrying on any business, trade or occupation."

Suan v. Caffé, 122 N. Y. 308, held that a married woman may form a partnership with her husband to carry on a business, and *Kingman v. Frank*, 33 Hun. 471 (N. Y.), expressly decided that where a wife was running a dry goods and notion business employing her husband at \$8.00 per week and had not paid him, the creditors of the husband could compel her to pay said sum to their benefit in proceedings supplemental to execution. Respondent contends that these citations and this explanation plainly show that the public policy of the state of New York is in accordance with our contention in the *Crandall* case, for if the wife can hire the husband, what reason can be given why the husband cannot hire the wife? The objection that the

marital status is a general claim upon all capacity for service could not be logically applied in either situation.

New Jersey's decisions are so archaic, resting as they do upon the common law point of view, that they are without force on the Pacific Coast in consideration of the property rights arising out of domestic relations. New Jersey law in *Clinton Station Mfg. Co. v. Hummell*, 25 N. J. Equity 45, goes so far as to say that even when the wife gets the money from her services she cannot keep it against the husband's creditors. The petitioner trustee in the *Crandall* case concedes that where a wife has received her wages she can keep them. Hence he does not seriously believe that New Jersey law is law here, for in that case, the decisions in California would render his position untenable. See *Von Glahn v. Brennan*, 81 Cal. 261; also *Larson v. Larson*, 15 Cal. App. 531.

Shaeffer v. Sheppard, 54 Alabama 244, is inapplicable because the common law rule is expressly applied as to choses in action and personalty before statute in Alabama changing it had been passed; and in that case the wife merely ran her husband's boarding house, while he paid the bills.

Hazebaker v. Goodfellow, 64 Ill. 238, decides expressly that corn raised by a deserted wife cannot be taken by a husband's creditors.

Lee v. Savannah Guano Co., 99 Ga. 572, merely decides that an agreement by husband to pay \$100.00 per year to wife to do the house work, fulfilled by a deed executed later when he is in debt, is void, but the court

intimated that when the *labor is outside her sphere*, the rule is far otherwise.

Miller v. Miller, 78 Iowa 177, has no force, for in that case after a family squabble the parties agreed to stop scolding and fault finding, each do their work, the wife to get \$200.00 per year. It was rightly decided on the grounds of public policy, that this financial arrangement could not be enforced. In Arkansas, *In re Suckle*, 176 Fed. 828, we have a jurisdiction where the law directs that a husband and wife cannot be business partners, nor can she hold a promissory note for her estate, nor convey lands by power of attorney, nor make executory contracts to convey, nor is the ante-nuptial deed rule abolished. This is public policy in Arkansas. Can a case from Arkansas be applicable to California?

Petitioner has called attention to far off Vermont and cited *In re Trombley*, 16 Am. Bank. Rep. 599. Let us see what the statutes were in Vermont covering this decision. See Vermont Statutes 1894, Sec. 2644 (Public Statutes in Vermont 147, Sec. 3037). "A married woman may make a contract with any person *other than her husband*, and bind herself and her separate property," etc.

Vermont Stats. 1894 2647 (Pub. Statutes of Vermont, Chap. 147, Sec. 3040): "All personal property and rights of action acquired by a woman before coverture or after coverture, *excepting from her husband*, shall be held to her sole and separate use * * * but nothing herein contained shall authorize a claim by either husband or wife against the other for personal

services." Can the law of Vermont be referred to as any kin to the law of California?

In *Larson v. Larson*, 15 Cal. App. 531, a California Court held that where a wife operated as a lodging house brokerage with her husband's consent the earnings were her separate property; and that furniture bought with said earnings remained her separate property though placed in the home and that she *could maintain an action against the estate of her husband after death* to have the furniture so declared her separate property. That circumstantial evidence of the husband's consent as to the disposition of her earnings was sufficient.

ADJUDICATIONS UPON THE POINT IN ISSUE.

The only case against the respondent is in the New York jurisdiction where *In re Kaufman*, 104 Fed. 768, was decided, and an examination of that case will show that the wife left her household duties to a servant, paid for by her husband, and the decision was covered by the consideration that she was only doing the equivalent of her household duties.

In re Domenig, 128 Fed. 147, decided that even where the husband and wife are living together, the wife keeping house and the husband paying the bills and the wife, besides being housekeeper, tends bar when her husband is away from his saloon and puts up free lunches for use therein and cleans up, she can recover her agreed wages at \$8.00 per week; this includes the three months priority. She had worked one year before her husband's bankruptcy. This decision is in spite of

Pennsylvania statute forbidding the wife to testify against or sue the husband. *Nuding v. Urich*, 169 Pa. St. 289, is to the same effect, where the wife works as a cook in the husband's restaurant. This was a case of assignment for benefit of creditors, I believe. *In re Novak*, 101 Fed. 800, makes the wife's claim the basis for involuntary petition against the husband in bankruptcy. *Collier on Bankruptcy*, 8th edition, page 704, lays down the rule that where the common law disability of the wife has been abolished by statute, she may have a claim against her husband's claim in bankruptcy even though the statute prohibits suit against her husband.

It has been held that the wife might sue alone for the protection of a note acquired by her before marriage against her husband.

36 Cal. 447, *Wilson v. Wilson*.

Counsel wishes to call the attention of the court to *Roche v. Union Trust Co.*, 52 N. E. 612 (Indiana), a case of assignment for the benefit of creditors. The wife recovers on notes given her by the husband for money loaned by her to him, the money having been earned by her work as clerk in his store. This decision is in spite of the Indiana statute. *Horner's Rev. Statutes* 1897, Sec. 1530: "A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married woman accruing from her trade, business, services or labor, other than labor for the husband or family, shall be her sole and separate property." Place this statute beside either the

California statute or the New York statute referred to in Kaufman, 104 Fed. 768, and we will see that the Indiana statute is by far the most unfavorable to the wife's contentions, and yet in the most carefully considered case I have been able to find, the said case of Roche v. Union Trust Co., above referred to, the court held that the wife could recover.

In the said decision the following cases are referred to:

29 N. W. 588 (Minn.), Riley v. Mitchell.

Wife gets judgment against stranger for board.

63 N. W. 461 (Iowa), Carse v. Reticker.

Wife gets money for boarding prisoners at \$.50 per day, her husband being sheriff.

36 N. J. Law 481, Peterson v. Mulford.

Wife earns money and buys assignment of mortgage against husband and recovers it against husband's estate.

23 Atlantic 856 (Vermont), Potter v. Potter.

Wife boarding father can recover the money therefor instead of husband.

38 Ill. App. 480, Woodyatt v. Connell.

Wife rents farm from husband and raises crops. Crops were hers.

In conclusion respondent contends that no fair-minded person can say but that a wife who, in addition to her duties at home, puts her shoulder to the wheel and does a day's work according to a man's standard,

either for strangers or for husband in a business proposition at an agreed scale of wages, is doing what she is neither morally or legally obliged to do.

We do not contend that she is entitled to wages by implication in the absence of agreement for compensation—still she might be. Nor do we contend that she should be entitled to wages for house work. The marriage status is beyond the power of the parties to alter by contract except that they may agree in writing for an immediate separation. But the business labors of a wife are a business proposition; she does not have to hire or be hired; even *Blaechinska v. Howard Mission*, 130 N. Y. 497, admits that the wife need not render said services even at husband's command.

If the claim of Nellie M. Crandall is disallowed it will in effect be compelling her to support her husband; it will be taking away the fruits of her labors which manifestly, as is admitted on all hands, she could convert into money at the hands of an outside employer, and is placing them in the hands of the husband's creditors, while allowing her not even the protection of an average workman. The only difference is that the workman would not have trusted Crandall for half his wages for over a year and Crandall would have gone on the rocks the sooner but for his wife's faithful assistance and forbearance.

Respectfully submitted,

J. W. MORIN,

Attorney for Respondent, Nellie M. Crandall, Claimant.

No.

2247

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,

Defendant in Error.

Writ of Error to the District Court of the United
States For the District of Oregon.

TRANSCRIPT OF RECORD.

RECEIVED

FEB 17 1913
F. D. MONGKTON,
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FILED

MAR 13 1913

No.

IN THE
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Defendant in Error.

**Names and Addresses of Attorneys
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*In the District Court of the United States for the
District of Oregon.*

BE IT REMEMBERED, that on the 24 day of April, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Transcript on Removal in words and figures as follows, to wit:

[Complaint.]

*In the Circuit Court of the State of Oregon for the
County of Baker.*

JAMES G. KIDWELL,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD COM-
PANY, a corporation,

Defendant.

Plaintiff for cause of action against the defendant,
ALLEGES:

I.

That the defendant, The Oregon Short Line Railroad Company, is a corporation organized and existing under the laws of the State of Utah as a common carrier of passengers and freight for hire, and at all the times herein mentioned was and still is engaged as such common carrier in the operation of a line of railroad extending from Huntington, Oregon, to American Falls, Idaho.

II.

That the Union Pacific Railroad Company is a cor-

poration organized and existing under the laws of the State of Utah as a common carrier of passengers and freight for hire, and at all the times herein mentioned was and still is engaged as such common carrier in the operation of a line of railroad from Granger, Wyoming, to Omaha, Nebraska.

III.

That the aforesaid railroads form a through and connected line of railroad between Huntington, Oregon, and Omaha, Nebraska. That the defendant and said Union Pacific Railroad Company by mutual traffic arrangement as such common carriers at all the times herein mentioned received at all stations on their respective railroads freight for transportation to and from all stations upon such through and connecting line between Huntington, Oregon, and Omaha, Nebraska.

IV.

That on the 4th day of December the defendant at its railroad station at Huntington in the State of Oregon, received 398 head of fat cattle in good health and condition of the average weight of 1250 pounds each, the property of plaintiff, for transportation over the aforesaid railroad lines of defendant and the said Union Pacific Railroad Company to South Omaha, Nebraska, through such intermediate point upon the railroad lines operated by the defendant and said Union Pacific Railroad Company as the plaintiff might thereafter in due time designate; said stock to be consigned to the plaintiff at such point of destination;

that the said defendant received said cattle for transportation as aforesaid under the regular tariffs and charges of said defendant and said Union Pacific Railroad Company as arranged by said defendant and said Union Pacific Railroad Company under their mutual traffic arrangement as hereinbefore set forth; that said cattle were billed to the plaintiff as consignee at Minnedoka in Idaho on the line of defendant's line of railroad, it being the intention of plaintiff as known to said defendant to continue the transportation of said cattle from Minnedoka to South Omaha; that said cattle upon arrival at American Falls were billed by the said defendant over its line of road and the line of road of the Union Pacific Railroad Company under the traffic arrangement and agreement as hereinbefore referred to, and that they were thereupon transported from said American Falls to South Omaha over the line of defendant and the line of said Union Pacific Railroad Company consigned to plaintiff at South Omaha; that said cattle were destined for the market at South Omaha, which fact was known to the defendant.

V.

That the said defendant and the said Union Pacific Railroad Company failed and neglected to perform their duties as such common carriers in and about the transportation of said cattle as aforesaid in this: that at divers occasions while said cattle were in transit between Huntington, Oregon, and South Omaha, Nebraska, the said cattle being then and there

confined and carried in cars in which it was impossible to give them proper or any food, water space or opportunity to rest, were transported and carried, and required by the said defendant and the said Union Pacific Railroad Company to remain confined in such cars for longer periods than 28 consecutive hours without unloading or permitting them to be unloaded from said cars for rest, water or food, and without any opportunity whatever for said cattle or any of them to receive such rest, water or food; that the defendant and the said Union Pacific Railroad Company were never at any time prevented from unloading said cattle for such purposes more frequently and at all proper times by reason of storms or other accidental causes of any nature; said cattle through their transit as aforesaid were by reason of the carelessness and negligence of the defendant and the said Union Pacific Railroad Company permitted and required to remain stationary while confined in said cars for a long and unreasonable period of time upon side-tracks at various stations of the said defendant and the said Union Pacific Railroad Company; that throughout the transportation of said cattle from Huntington to South Omaha the train and trains upon which they were being carried were so carelessly, negligently and roughly handled by the employes of the said two railroad companies in charge thereof that said cattle were frequently thrown down, bruised and maimed; that throughout the transportation of said cattle said two railroad

companies wrongfully, carelessly and negligently permitted and caused the transportation of said cattle between said Huntington and South Omaha to be unusually delayed and said transportation between said two points consumed an unreasonable and unusual length of time, which delay and unreasonable length of time occupied in the transportation of said cattle could have been prevented by the exercise of the care and diligence required of said two railroad companies as such common carriers.

VI.

That by reason of the failure of the said defendant and the said Union Pacific Railroad Company to permit said cattle to be watered, fed and rested at proper times and by reason of their carelessness and negligence in requiring said cattle to remain confined in the said cars for such long periods of time without giving them opportunity for food, rest and water, and by reason of their bruised, maimed and weakened condition caused by the carelessness and negligence of said two railroads and the unnecessary delay in the transportation of said cattle, the said cattle during their transportation were unable to be properly fed and nourished and were rendered incapable of being properly nourished and fed; that by reason of the careless and negligent acts of the two railroad companies as aforesaid the said cattle arrived at the destination at South Omaha at a greatly reduced, deteriorated and weakened condition with a loss in weight to each of said cattle of 72 pounds more than the shrinkage

which they would have sustained from the transportation excepting for the careless and negligent acts of the defendant and said Union Pacific Railroad Company as herein alleged while they were in transit.

VII.

That upon the arrival of said cattle at Omaha if said cattle had been subjected to only the usual and ordinary hardships incident to their transportation between Huntington and South Omaha, and but for the careless and negligent acts of the defendant and said Union Pacific Railroad Company as herein alleged their value would have been \$5.00 per hundred weight at said South Omaha, and the plaintiff would have sold them at such price, but owing to their reduced and deteriorated condition caused solely by the aforesaid careless and negligent acts of said two railroad companies in transporting them the value thereof became greatly lessened, and was reduced to the sum of \$4.27 per hundred weight; that plaintiff was compelled to and did sell said cattle at such last named price in South Omaha, which was the best and highest price attainable therefor; that by reason thereof the plaintiff on account of the careless and negligent acts of the two railroad companies in the transportation of said cattle as herein alleged suffered damage in the sum of \$4627.00, and by reason of the failure of the said defendant, the Oregon Short Line Railroad Company, to permit said cattle being unloaded and fed at seasonable and proper times and places during their transit, the plaintiff was compelled to

pay for the maintenance of said cattle while en route \$300.00 more than he would have been compelled to pay if the defendant had permitted them to be fed and cared for during their transit over its line at seasonable and proper times and places, and that such extra expense was the result solely of the carelessness and negligence of the defendant.

VIII.

That while said cattle were so in transit and in the possession of the defendant the plaintiff complained to the said defendant both at Minnedoka and at American Falls, and at other places and notified the said defendant that he expected to hold it liable for his loss and damage by reason of the negligent and careless handling of said cattle and delay in the transportation thereof.

IX.

Immediately upon the arrival of said cattle at South Omaha the plaintiff notified the Union Pacific Railroad Company of his claim for damages by reason of the careless and negligent handling of said cattle by the said defendant and the said Union Pacific Railroad Company.

WHEREFORE, plaintiff prays judgment against the defendant, The Oregon Short Line Railroad Company, for the sum of \$4927.00 and the interest from the 20th day of December, 1909, and for his costs and disbursements herein.

JOHN L. SHARPSTEIN, and
FRANK B. SHARPSTEIN,

Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah,—ss.

I, James G. Kidwell, being first duly sworn, say:
That I am the plaintiff in the foregoing cause of action;
that I know the contents of the foregoing complaint and believe the same true.

JAMES G. KIDWELL.

Subscribed and sworn to before me this 25 day of
March, 1911.

F. J. GETTRELL,
Notary Public for Oregon.

[Endorsed]: Filed March 29, 1911.

A. B. COMBS, Jr.,
Clerk.

[Petition for Removal.]

(Title)

Your petitioner, Oregon Short Line Railroad Company, a corporation, the defendant above named, by this, its petition, respectfully shows to this Honorable Court:

That this is an action at law of a civil nature, and the matter and amount herein in dispute between the plaintiff and your petitioner exceeds the sum or value of \$2,000.00 exclusive of interest and costs, to-wit the sum of Four Thousand Nine Hundred Twenty-seven (\$4,927.00) Dollars and interest thereon from December 20, 1909. That this action was commenced in the above entitled Court on the 29th of March, 1911, and that Summons issued out of said Court in said

cause on the 29th day of March, 1911, and the said Summons was served upon this defendant at Huntington, Oregon, in the County of Baker, State of Oregon, on the 3rd day of April, 1911; and that by the laws of the State of Oregon, and by the rules of the above entitled Court in which said action was brought, and is now pending, this defendant is not required to answer or plead to plaintiff's complaint in said suit until the 13th day of April, 1911; no summons or other processes having been served upon the defendant above named until April 3, 1911, as aforesaid.

That there is in said action a controversy wholly between citizens of different states.

That your petitioner, Oregon Short Line Railroad Company, a corporation, was at the time of the commencement of this action, and ever since has been, and is now a corporation organized and existing under and by virtue of the laws of the State of Utah, and no other state; and that it was at the time of the commencement of this action, and ever since has been, and is now a resident and citizen of the State of Utah and no other state; and it never was or is not now a resident or citizen of the State of Oregon.

That the plaintiff James G. Kidwell, was at the time of the commencement of this action, and ever since has been, and is now a resident and citizen of the State of Washington, residing at Walla Walla in said state.

That this action is brought by the plaintiff to recover from the defendant, and your petitioner, a judg-

ment for Four Thousand Nine Hundred Twenty-Seven (\$4,927.00) Dollars and interest thereon from December 20, 1909, and the costs and disbursements of this action for and on account of loss and damage in the shipment on or about the 4th day of December, 1909, of certain cattle, about 398 head, from its railroad station at Huntington, in the State of Oregon, to South Omaha in the State of Nebraska; it being alleged that the plaintiff shipped three hundred ninety-eight (398) head of fat cattle in good health and condition, of the average weight of 1250 lbs., property of the plaintiff at Huntington, a railroad station of the defendant in the State of Oregon, for transportation over the lines of the defendant and the Union Pacific Railroad Company to South Omaha, Nebraska, through intermediate points upon the railroad lines operated by the defendant, and the said Union Pacific Railroad Company, as the plaintiff might thereafter, in due time, designate; said stock to be consigned to the plaintiff at such point as designated; and that the said defendant received said cattle for transportation under the regular tariffs and charges of the defendant and the Union Pacific Railroad Company as arranged by said defendant and said Union Pacific Railroad Company under their mutual traffic arrangement; that said cattle were billed to the plaintiff as consignee at Minnedoka in Idaho on the line of defendant's line of railroad, it being the intention of the plaintiff as known to the defendant to continue the transportation of the said cattle from said Minne-

doka to said South Omaha; and that the said cattle upon arrival at American Falls were billed by the defendant over its line of road and the line of road of the Union Pacific Railroad Company under the traffic arrangement and agreement between them; and that the cattle were thereupon transported from said American Falls to South Omaha over the line of the defendant and the line of the said Union Pacific Railroad Company, consigned to the plaintiff at South Omaha; and that said cattle were destined for market at South Omaha, and that such fact was known to the defendant.

That the defendant and the Union Pacific Railroad Company failed and neglected to perform their duty as such common carriers in and about the transportation of such cattle in this: That at divers occasions when said cattle were in transit, between Huntington, Oregon, and South Omaha, Nebraska, the said cattle, being then and there confined and carried in cars in which it was impossible to give them proper or any food, water space or any opportunity to rest, and were transported and carried and required by said defendant and the said Union Pacific Railroad Company to remain confined in such cars for longer periods than twenty-eight (28) consecutive hours without unloading or permitting them to be unloaded from said cars for rest, water or food, and without any opportunity whatever for said cattle or either of them to receive such rest, water or food.

And it is further alleged that the defendant and the

said Union Pacific Railroad Company were never, or at any time prevented from unloading said cattle for such purposes more frequently or at all proper times by reason of storms or other accidental causes of any nature; and that such cattle through their transit and by reason of the carelessness and negligence of the defendant and the said Union Pacific Railroad Company, were permitted and required to remain stationary while confined in said cars for a long and unreasonable period of time upon the side tracks at various stations of said defendant and the said Union Pacific Railroad Company; and that throughout the transportation of the said cattle from Huntington to South Omaha, the train and trains upon which they were being carried were so carelessly, negligently and roughly handled by the employees of the said two railroad companies, in charge thereof, that said cattle were frequently thrown down, bruised and maimed, and that throughout the transportation of the said cattle, the said two railroad companies wrongfully, carelessly, and negligently permitted and caused the transportation of said cattle between said Huntington and said South Omaha to be unusually delayed, and the said transportation between said points consumed an unreasonable and unusual length of time, which delay and unreasonable length of time in the transportation of said cattle could have been prevented by the exercise of the care and diligence required by the said two railroad companies as such common

carriers; and that by reason thereof, the plaintiff sustained the loss and damage, amounting in the aggregate to Four Thousand Six Hundred Twenty-seven (\$4,627.00) Dollars, and was compelled to and did pay for maintenance of the said cattle while en route, and in addition thereto, Three Hundred (\$300.00) Dollars more than he should have been compelled to pay if the Defendant had permitted the cattle to be fed and cared for during their transportation over its lines at reasonable and proper times and places; and that such extra expense was the result solely of the negligence and carelessness of the defendant, causing the plaintiff to sustain loss, damage and expense, amounting in the aggregate to Four Thousand Nine Hundred Twenty-Seven (\$4,927.00) Dollars.

And your petitioner, Oregon Short Line Railroad Company, a corporation, denies each and every allegation or charge of carelessness, negligence or delay; or notice; and your petitioner offers herewith good and sufficient sureties for its entering in the Circuit Court of the United States, for the District of Oregon, on the first day of the next session of the said Court at Portland, Oregon, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner therefore prays that this Honorable Court proceed no further herein except to make the order of removal by law, and to accept said bond and surety, and cause the record

herein to be removed to said Court, and your petitioner will ever pray.

OREGON SHORT LINE RAILROAD COMPANY,

by CHARLES A. JOHNS,
Agent and Attorney for Oregon Short Line Railroad
Company.

P. L. WILLIAMS and
CHARLES A. JOHNS,
Attorneys for Petitioner.

State of Oregon,
County of Baker.—ss.

I, Charles A. Johns, being first duly sworn, depose and say, that I am the attorney for the Oregon Short Line Railroad Company, a corporation, the petitioner named in the foregoing petition; that as such attorney I have authority to sign the Oregon Short Line, Railroad Company's name to the foregoing petition, and make this verification upon its behalf; that I have read the foregoing petition and that the same is true; of my own knowledge; that there is no officer of said Oregon Short Line Railroad Company with the State of Oregon.

(Signed) CHARLES A. JOHNS,

Subscribed and sworn to before me this 12th day
of April, 1911.

(Signed) VERA E. TAYLOR,
(Notarial Seal) Notary Public for Oregon.

And attached to the foregoing Petition is the following Affidavit:

STATE OF OREGON,
County of Baker:—ss.

I, Charles A. Johns, being first duly sworn, say, that I am one of the Attorneys for the defendant, Petitioner herein, and that I served the within Petition upon the plaintiff on the 12th day of April, 1911, by depositing a copy of such Petition for removal, duly certified to by me as such attorney, in the post office at Baker, in the County of Baker, State of Oregon, with postage fully prepaid thereon, addressed to John L. Sharpstein and Frank B. Sharpstein, the attorneys for plaintiff, to their office in the Baker-Boyer Bank Building at Walla Walla, Washington.

(Signed) CHARLES A. JOHNS,

Subscribed and sworn to before me this 12th day of April, 1911.

(Signed) VERA E. TAYLOR.

(Notarial Seal) Notary Public for Oregon.

Endorsed on the foregoing as follows:

Filed: April 12, 1911.

A. B. COMBS, Jr.,
Clerk.

[Bond on Removal.]

(Title)

KNOW ALL MEN BY THESE PRESENTS:
That we, Oregon Short Line Railroad Company, a corporation, as principal, and C. J. Johns and C. K. DeNeffe, as sureties, are holden and stand firmly bound unto the plaintiff, James G. Kidwell, in the

penal sum of Five Hundred (\$500.00) Dollars, for the payment whereof well and truly to be made unto the said plaintiff, James G. Kidwell, his heirs, representatives and administrators, we bind ourselves, jointly and severally, our heirs, executors, successors and assigns firmly by these presents upon the condition nevertheless that:

WHEREAS, the Oregon Short Line Railroad Company, a corporation, has filed its petition in the Circuit Court of the State of Oregon for the County of Baker for the removal of a certain cause therein pending, wherein James G. Kidwell is plaintiff and the Oregon Short Line Railroad Company, a corporation, is defendant, to the Circuit Court of the United States in and for the District of Oregon.

Now, if said Oregon Short Line Railroad Company, a corporation, shall enter in said Circuit Court of the United States on the first day of its next session at Portland, Oregon, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that the said action was wrongfully or improperly removed, thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof, we, the said Oregon Short Line Railroad Company, a corporation, and C. J. Johns and C. K. DeNeffe have hereunto set our hands and seals this 12th day of April, 1911.

OREGON SHORT LINE RAILROAD COM-
PANY,

By CHARLES A. JOHNS,
Its Attorney.

C. K. DeNEFFE, Surety. (Seal.)

C. J. JOHNS, Surety. (Seal.)

STATE OF OREGON,

County of Baker—ss.

I, C. J. Johns, and I, C. K. DeNeffe, make solemn oath and each for himself says, that I reside in Baker, County of Baker and State of Oregon; that I am a free holder in said county, and am worth the sum of Five Hundred (\$500.00) Dollars over and above his debts and liabilities, exclusive of property exempt from forced sale of execution.

(Signed)

C. J. JOHNS.

C. K. DeNEFFE.

Subscribed and sworn to before me this 12th day of April, 1911.

(Signed)

VERA E. TAYLOR,

(Notarial Seal)

Notary Public for Oregon.

Endorsed on the foregoing as follows: The within undertaking is approved this April 12, 1911.

(Signed)

WILLIAM SMITH,

Judge of the 9th Dist. of Oregon.

[Endorsed]: Filed April 12, 1911.

A. B. COMBS, Jr.,

County Clerk.

And Afterwards, to wit, on the 7 day of September,

1911, there was duly filed in said Court, an Answer in words and figures as follows, to wit:

[Answer.]

(Title)

Comes now the Oregon Short Line Railroad Company, the defendant herein, and for answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Denies each and every allegation contained in paragraph III of the complaint, except that defendant admits that the line of railroad of the Oregon Short Line Railroad Company and of the Union Pacific Railroad Company have a physical connection and operate under joint traffic arrangements.

IV.

Denies each and every allegation contained in paragraph IV of the complaint, except that defendant admits that on or about the fourth day of December, 1909, this defendant received from The Oregon Railroad & Navigation Company at Huntington, Oregon, a shipment of live stock consisting of sixteen carloads, for transportation from Huntington, Oregon, to Min-

idoka, Idaho, to be there delivered to James G. Kidwell, the plaintiff herein; admits that thereafter the defendant, acting upon the instructions of the plaintiff herein, forwarded said shipment from Minidoka, Idaho, over its line of railroad to a connection with the Union Pacific Railroad Company, who in turn transported said shipment to South Omaha, Nebraska.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in paragraph VI of the complaint.

VII.

Denies each and every allegation contained in paragraph VII of the complaint.

VIII.

Denies each and every allegation contained in paragraph VIII of the complaint.

IX.

Denies each and every allegation contained in paragraph IX of the complaint.

And for a further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That it is now and at all the times herein mentioned has been a corporation duly organized and existing under the laws of the State of Utah and engaged in the operation of a line of railroad extending from

Huntington, in the State of Oregon (at which point it has a physical connection with the line of railroad of The Oregon Railroad & Navigation Company) to Granger, in the State of Wyoming, at which point it has a physical connection with the line of railroad of the Union Pacific Railroad Company, which in turn operates a line of railroad extending to South Omaha, Nebraska; that it is and was at all the times herein mentioned engaged in interstate commerce and subject to all the terms and provisions of an Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" and acts amendatory thereof.

II.

That on and prior to the dates of the movement of the shipment of live stock herein referred to, this defendant and The Oregon Railroad & Navigation Company and the Union Pacific Railroad Company posted, published and filed with the Interstate Commerce Commission at Washington, D. C. and with and as a part of its tariff as required by law, its rules and regulations affecting and governing the transportation and carriage of live stock, and at all the times herein mentioned said rules and regulations were in full force and effect, and the shipment here referred to moved under and pursuant to said rules and regulations, and not otherwise.

III.

That said rules and regulations, posted, published and filed as hereinbefore referred to, provide among other things as follows, to-wit:

“13. TIME TABLES AND SCHEDULES for the movement of trains may be varied by the companies at their pleasure or convenience. They do not undertake to carry live stock to arrive at any market point on any particular market day or market hour, nor are their time cards and time tables to be regarded as an undertaking by the companies to deliver at the hours or times therein fixed.”

“Rates named in the company’s tariff applying on live stock are subject to rules and conditions of the current live stock contract.”

In said current live stock contract it is provided, among other things, as follows:

“Agents of the railroad company are expressly forbidden to contract for delivery of live stock at any specified time or for any particular market, and no agent of any carrier may, under any circumstances, alter, change or modify or agree to alter, change or modify any of the terms of this contract.

“It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass, is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable. * * *

“It being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.”

“No carrier shall be liable for any loss or damage

to said stock by causes beyond his control. * * * Shrinkage in weight, changes in weather, heat, cold or any other causes not directly the result of gross negligence on the part of said carriers, their agents and servants.

"The shipper expressly agrees to load, unload and care for said stock while upon the cars or premises of the carrier, in a careful and humane manner in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

"Unless claims for loss, damage or detention are presented within ten days from the date of unloading of said stock at destination and before said stock has been mingled with other stock, such claim shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability."

Said current live stock contract referred to is in words and figures as follows, to-wit:

Form 776

(Duplicate.)

8-05—10,000

(Standard)

THE OREGON RAILROAD & NAVIGATION
COMPANY.

Limited Liability Live Stock Contract.

Read this Contract.

No. 355

Baker City, Oregon, Station. Dec. 3, 1909.

THIS AGREEMENT, made this Third day of December, 1909, by and between The Oregon Railroad & Navigation Company, hereinafter called the carrier,

and J. G. Kidwell of Baker City, Oregon, hereinafter called the shipper:

WITNESSETH, That the said shipper has delivered to the said carrier sixteen cars of Cattle consigned to J. G. Kidwell at Minidoka destination, via Hunt, to be transported upon the conditions hereinafter set forth over the line of The Oregon Railroad & Navigation Company to Huntington (Insert only a station on O. R. R. & N.) and there deliver to the consignee, owner, or order; or to such company or carrier (if the stock is to be forwarded beyond said station) whose line may be considered a part of the route to destination, it being understood that in and about the delivery of said stock to such connecting carrier The Oregon Railroad & Navigation Company acts only as agent for the consignee or owner, and that the liability of each carrier hereunder shall cease and determine upon delivery of said stock to the next connecting carrier, the consignee or owner.

It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. It is further agreed and understood that the person delivering to this company the shipment or any part thereof described herein is authorized to sign this contract for

and on behalf of the shipper, with full power in the premises.

NOTICE.

Blooded animals, or animals deemed especially valuable, will be carried only on special contract, and railroad agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the railroad company or its duly authorized agent.

Men only, in charge of stock may accompany the same upon the rules and regulations set forth in circulars issued by the railroad company, and upon executing the release of liability printed on back hereof.

Agents of the railroad company are expressly forbidden to contract for delivery of live stock at any specified time, or for any particular market; and no agent of any carrier may under any circumstances alter, change or modify, or agree to alter, change or modify any of the terms of this contract. Special contracts can only be made by the General Freight Agent, with whom the Agent, upon request of the shipper, will communicate by wire.

THIS DOCUMENT MUST BE PRESENTED
WITHOUT ALTERATION OR ERASURE.

Said shipper for himself, the consignee or owner, agrees to pay or guarantee the freight thereon at the rate of \$93.40 per standard car of 29 to 30½ ft. in length, (subject to established per cent. decrease or increase applicable to cars of less or greater length), or \$.....

per hundred pounds, (subject to established minima for cars of varying lengths) as shown by Limited Liability Tariffs governing, or if in less than carload lots \$..... per hundred pounds subject to the established minima as provided by current classifications, which rate is less than the regular tariff rate for the transportation of live stock at carrier's risk, and is given said shipper at his special request, in part consideration of his agreement to the limitation of the liability of the railroad company as a common carrier upon the terms and conditions herein set forth, which are accepted and agreed to by the shipper as just and reasonable, it being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.

In consideration of the special reduced rate herein provided for the transportation of the live stock above-described it is hereby stipulated and agreed as follows:

1. The carriers shall not be liable for the loss or death of, or for any injuries received by any of said stock unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants, or employes.

2. It is expressly agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to-wit:—†

Horses, mules or jacks, not exceeding \$..... per head; oxen, bulls or steers, not exceeding \$50 per

head; cows, not exceeding \$..... per head; hogs or calves, not exceeding \$..... per head; sheep or lambs, not exceeding \$..... per head;

and in no event shall the carrier's liability exceed \$1,000 upon any carload, such valuations being those whereon the rate of compensation to said carriers for their services and risk connected with the transportation of said live stock is based.

3. The shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned or controlled by said carriers or otherwise, and while on the cars or at feeding points, or at any place where the same may be unloaded for any purpose whatever.

4. The shipper assumes the exclusive duty of properly and securely fastening said stock in the cars, and of removing them therefrom, and of keeping such cars, and any enclosure in which said stock may be confined, securely locked or fastened so as to prevent escape of stock therefrom. The shipper agrees to inspect the cars in which said stock is to be transported, and any yards or enclosure on the premises of the railroad company into which said stock may be unloaded, and satisfy himself that they are sufficient and safe and in proper order and condition; and shall report to the agent or employees of said carrier any visible defects therein, and demand necessary repairs before proceeding to occupy said cars or enclosures; and the

fact of his loading said stock into said cars or occupying said enclosure shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect of said cars and enclosures for the shipment and yarding thereof; and he hereby assumes all risk of injury which said live stock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other or themselves; by or in consequence of heat or suffocation, or any other ill effects of being crowded or injured; by the burning of straw, hay or other material loaded with or used for feeding the stock or otherwise; and also all risk of damage which may be sustained by reason of delay in transportation, and all risk of escape of any portion of said stock; or loss or damage from any other cause or thing not resulting from the willful negligence of the carriers, their officers, agents or employes.

5. If the carriers or any of them shall furnish any laborer or laborers to assist in loading or unloading said stock at any point, no additional charge being made therefor, such laborer or laborers shall while so engaged be deemed exclusively the employes of the shipper and no carrier shall in any event be liable for any act or thing done or omitted to be done by such laborer or laborers in connection with said stock while so engaged.

6. If the car or cars wherein said stock is to be transported shall be furnished by the shipper and tendered to the carriers for that purpose, said shipper assumes all risk for, in, and about said car or cars,

and no liability or responsibility shall attach to any carrier or carriers under this contract arising from or growing out of any insufficiency or defect in the condition of any such car or cars.

7. No carrier shall be liable for any loss or damage to said stock by causes beyond its control, by floods, fire, quarantine, disease, riots, strikes, or stoppage of labor; shrinkage in weight, changes in weather, heat, cold, or any other cause not directly the result of gross negligence on the part of said carriers, their agents and servants.

8. The shipper expressly agrees to load, unload, and care for said stock while upon the cars or premises of the carriers, in a careful and humane manner, in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock, shall have the benefit of any insurance that may have been effected thereupon.

10. The rules, regulations and conditions prescribed by the carriers for the transportation of live stock, as evidenced by their published tariffs, classifications and circulars in force and effect, are binding

upon the shipper. The signing of this contract by the shipper or his agent shall be conclusive evidence of knowledge, assent and agreement to each and every stipulation and condition thereof by said shipper.

THE OREGON RAILROAD & NAVIGATION
COMPANY.

By M. H. DAUGHERTY,
Station Agent.

Witness my hand J. G. KIDWELL,
Shipper.

By
Shipper's Agent.

H. L. BRAGG,

Witness.

*Erase the word "head" when stock is forwarded in car loads, and the word "cars" when number of head is to be specified.

†Agent will insist upon shipper making the insertion in the blank spaces on this contract showing the valuation of the live stock to be shipped.

Copy

— Duplicate

No of Way Bill	Car No.	Initial
2406	76109	S P
2407	75758	S P
2408	60868	U P
2409	14335	M & T
2410	60154	U P
2411	14038	O S L
2412	13185	O S L

2413	75848	S P
2414	61506	U P
2415	14495	M & T
2416	13169	O R & N
2417	60323	U P
2418	13303	O S L
2419	14364	M & T
2420	13288	O S L
2421	76120	S P

Endorsement on back:

Duplicate

THE OREGON RAILROAD & NAVIGATION
COMPANY.

Limited Liability

Live Stock Contract.

Executed by J. G. Kidwell at Baker City, Oregon, Station, Dec. 3, 1909, for 16 Cars of Cattle good for transportation of three (3) men. (Billing agent stamp here.) From Baker City to Minindoka, Idaho, when accompanying the stock herein described and not otherwise.

RELEASE FOR MAN OR MEN IN CHARGE.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby voluntarily assume all risk of accident or damage to his (or their) person or property, and do hereby re-

lease and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employes or otherwise.

1. Joe Lonegon
2. H. H. Chowredge
3. J. G. Kidwell

Signature of man (or men) in charge.

(Agent will draw pen through spaces not used.)

H. L. Bragg, Witness.

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent at destination, within 30 days from date of executing the within contract, receive ticket or tickets for the return journey.

TIME OF LOADING.

Dec. 3, 1909. Hour, 8:30 p. m. Rested at.....
Date arrived, Hourm. Date dept'r
....., Hourm.

.....
Name of Consignee.

Endorsed on back: Receipt for the Return transportation of live stock attendants.Station

.....190..... Received Drivers' Tickets as follows for Return Transportation from..... to..... Witness.

Said current live stock contracts hereinbefore referred to and described are published and filed with the Interstate Commerce Commission with and as a part of said companies' circulars and tariffs.

IV.

That heretofore and on or about the 3rd day of December, 1909, James G. Kidwell, the plaintiff herein, delivered to The Oregon Railroad & Navigation Company, at Baker City, Oregon, sixteen carloads of wild and unruly cattle, in poor shipping condition, the exact number of which is unknown to this defendant, with instructions to transport said shipment from Baker City, Oregon, over the lines of The Oregon Railroad & Navigation Company to Huntington, Oregon, and thence to Minidoka, Idaho, over the lines of railroad of this defendant, and there deliver said shipment to James G. Kidwell, the plaintiff herein; that thereafter and in due course of business and without any unnecessary delay said shipment was transported over said lines of railroad to Minidoka, Idaho, and thereupon tendered to the plaintiff herein for delivery; that owing to the fact that a violent and unusual storm was raging at said time, and the further fact that it was almost impossible for the plaintiff to purchase feed at Minidoka for his cattle, he refused to unload same at Minidoka, and thereafter and upon plaintiff's request said shipment was transported to

American Falls, at which point said cattle were unloaded.

V.

That after unloading said stock at American Falls it was found that the storm had not abated, and that feed for said stock was very scarce, and that farmers demanded an exorbitant price therefor; that by reason thereof plaintiff reloaded and shipped his stock from said point to South Omaha, Nebraska.

VI.

That this defendant and Union Pacific Railroad Company and The Oregon Railroad & Navigation Company had, on and prior, and subsequent to December 3, 1909, in full force and effect, duly published and filed rates applying on shipments of live stock, which rates were lower on shipments moving under the terms and provisions of the current live stock contract than were the rates on shipments transported by the railroad companies under their commonlaw liability; that by reason thereof the plaintiff requested and received the benefit of the lower rate applying on said shipment, and at said time and place executed and entered into in writing the current live stock contract commonly known and described as the Limited Liability Live Stock Contract; that said contract was executed for and on behalf of The Oregon Railroad & Navigation Company by M. H. Dougherty, who was at said time the Station Agent of said The Oregon Railroad & Navigation Company at Baker City, Oregon, and was authorized to enter into such con-

tracts on behalf of The Oregon Railroad & Navigation Company and of this defendant; that said contract was executed on behalf of the plaintiff by J. G. Kidwell, the plaintiff herein.

VII.

That said shipment was promptly transported over the lines of the defendant, railroad company, and over the lines of The Oregon Railroad & Navigation Company and of the Union Pacific Railroad Company in a proper car in due course of business, without unnecessary or unusual delay, and delivered to and accepted by the plaintiff at South Omaha, Nebraska, in the same order and condition said stock was in when received by the defendant, except ordinary and usual depreciation which all live stock in transit are liable to, and depreciation due to the poor shipping condition of said stock, and the further fact that plaintiff refused and neglected to unload and feed said stock in transit from the cars were spotted at different unloading points, and by the failure of the plaintiff or his agents to properly care for, feed and tend to said stock, and the further fact that said stock was wild and unruly and by reason thereof injured themselves and each other, and that plaintiff or his agents did not give said stock proper feed, water or attention, and was not caused by any fault, negligence or want of care on the part of this defendant, its agents or employes.

VIII.

That plaintiff failed and neglected to give notice to

this defendant of his alleged claim for loss and injury to said stock within ten days from the date of unloading of said stock at South Omaha, Nebraska, or before said stock had been mingled with other stock, and by reason thereof whatever, if any, claim plaintiff may have had against this defendant is deemed waived under the terms of said live stock contract. The shipment herein referred to is the same shipment referred to in plaintiff's complaint.

WHEREFORE, having fully answered plaintiff's complaint herein, defendant demands that this action be dismissed and it have and recover its costs and disbursements herein.

W. W. COTTON,
P. L. WILLIAMS,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Defendant.

[Endorsed]: Answer. Filed Sep. 7, 1911.

G. H. MARSH,
Clerk.

And Afterwards, to wit, on the 12 day of January, 1912, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

[Reply.]

(Title)

Comes now the plaintiff and replying to the defendant's Answer herein, admits, denies and alleges as follows:

I.

Replying to the further and separate answer and defense of the defendant herein, plaintiff admits the first paragraph thereof.

II.

Replying to the said further and separate answer and defense of the defendant herein, plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the truth of the matters and things set forth and alleged in the Second and Third paragraphs of said answer and therefore denies the same.

III.

Admits the delivery of sixteen carloads of cattle to the Oregon Railroad & Navigation Company at Baker City, Oregon, on or about the 3d day of December 1909, but denies each and every other allegation of the Fourth paragraph of defendant's said answer.

IV.

Admits that plaintiff re-loaded said cattle at American Falls, Idaho, after feeding the same at said point, but denies each and every other allegation of the Fifth paragraph of defendant's said answer.

V.

Admits the execution of what is termed by the defendant a limited liability livestock contract, but alleges that the same was executed under the condition hereinafter set forth, and denies each and every other allegation of the Sixth paragraph of defendant's said answer.

VI.

Denies each and every allegation of the Seventh paragraph of the defendant's said answer.

VII.

Admits that plaintiff did not give notice to the defendant of his said claim for loss and injury to said stock within ten days from the date of unloading said stock at South Omaha, Nebraska, except and other than the notice given by plaintiff to the Union Pacific Railroad Company, and to the agents of the defendant, as alleged in the complaint herein, for the reason that the defendant herein at said time had and maintained in said city of South Omaha, Nebraska, no office or agent other than said Union Pacific Railroad Company.

VII.

Further replying to the said separate answer and defense of the defendant herein, plaintiff alleges: that the bill of lading, termed a "limited liability live-stock contract" by the defendant and set out in defendant's said answer and defense herein, was prepared by the Oregon Railroad & Navigation Company and presented to the plaintiff for his signature; that no option or opportunity was offered or given the plaintiff to examine or accept any other or different bill of lading or any other or different rate; that the said bill of lading was signed by the plaintiff without reading or having an opportunity to read the same and without any knowledge of the contents thereof; and that said bill of lading was so signed by

the plaintiff with the understanding that it was the only bill of lading issued by the said Oregon Railroad & Navigation Company, and without any intention on the part of the plaintiff to accept the terms thereof or intention to waive any rights thereby, and was so signed without any consideration moving to the plaintiff therefor.

IX.

And further replying to the said separate answer and defense of the defendant herein, the plaintiff alleges: that the said bill of lading termed a "limited liability livestock contract" by the defendant, and set out in defendant's answer herein, in so far as it attempts to limit the liability of the defendant for any loss, damage or injury to the cattle in said bill of lading mentioned and described in plaintiff's complaint herein, is void, being in violation and contravention of Section Seven (7) of the Act of Congress, known as the Hepburn Act," passed June 29, 1906. (C. 3591, 34 Stat. 595; Fed. Stat. Ann. 1909 Supplement, pages 273, 274.)

WHEREFORE, Plaintiff demands judgment against the defendant as demanded in his complaint herein.

SHARPSTEIN & SHARPSTEIN, and
KING & SAXTON,

Attorneys for Plaintiff

[Endorsed]: Reply. Filed Jan. 12, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 11 day of June 1912, the same being the 95 Judicial day of the Regular March 1912 Term of said Court; Present: the HONORABLE R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment.]

(Title.)

This cause came on regularly at this time, for further trial pursuant to continuance, Jury and attorneys present as heretofore: and thereupon motion for non-suit came on regularly for the decision and ruling of the court and thereupon after due consideration it is Ordered that motion for non-suit be and the same is hereby allowed. Whereupon it is Ordered and Adjudged that complaint herein be and hereby is dismissed and that defendant, Oregon Short Line Railroad Company, have and recover of and from plaintiff J. G. Kidwell its costs and disbursements herein taxed at \$256.85.

And afterwards, to wit, on the 20 day of September 1912 there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to wit:

[Bill of Exceptions.]

(Title.)

BE IT REMEMBERED, that at a Regular Term of the District Court of the United States for the Dis-

trict of Oregon, holden in Portland, Oregon, on June 7th, 1912, the Hon. ROBT. S. BEAN, presiding, the above cause coming on to be tried before a jury, the following proceedings were had, to wit:

EXCEPTION NO. ONE.

(Being to the ruling of the Court on)

(Defendant's Motion for a Non-suit.)

The Plaintiff, JAMES G. KIDWELL, being sworn, testified in his own behalf as follows:

I am the plaintiff; J. C. Lonergan of Portland, and H. H. Trowbridge of John Day were interested with me in these cattle; I saw these cattle first about 4 weeks before their shipment; I have been in the cattle business about 23 years, ever since I have been grown; buy and sell cattle in Oregon, Washington and Montana; raise and handle lots of cattle; I did not buy the cattle constituting this shipment, I received them; I purchased cattle the same year and for a great many years out of the same territory; the cattle which I purchased were the same kind of cattle as the cattle involved in this case but younger; the cattle which I bought were 2 and 3 years old; the cattle involved in this case were 25 head, probably 30 head, 3 year old steers, and the balance 4 and 5 year old steers, about half and half; 3 and 4 year old steers generally weigh about 75 or 100 pounds more than 2 and 3 year old steers; one bunch of these cattle which I purchased out of the same country as the cattle in this case weighed (averaged) 1228 pounds at Baker City, another bunch 1247 pounds and another

er bunch 1280 pounds; I estimate that the cattle constituting the shipment in this case would at the time they were loaded on the cars at Baker City weigh 1260 to 1270 pounds each; they had been driven about eleven miles before loading and were fed and watered up to the time we started with them; I shipped these cattle from Baker City over the O. R. & N., now the O.-W. R. & N.; made the contract with Mr. Daugherty, the agent of this O. R. & N. at Baker City; I talked with him about the conditions along the line of the O. S. L.; I told him when I ordered the cars, sixteen cars, that I wanted to ship to South Omaha with a feed in transit rate at some point in Idaho, either some point around American Falls or Minidoka; Mr. Daugherty said he had no feed in transit rate, couldn't find where there was any feed in transit rate at Minidoka or American Falls; I told him then to investigate and find out whether there was good yards at American Falls or Minidoka big enough to hold these cattle, good feed yards, if there wasn't I wanted to bill them feed in transit Pocatello; he said he couldn't give me feed in transit rate; said he had nothing in his tariff that went in there; he figured the tariff and told me there was only a small difference between a feed in transit rate and to bill them locally and he says we will just bill them locally and then if you decide to take them on, we will take them on, rebill them at so much per hundred with a minimum so much per car; well, I told him that I would bill them locally to where he would find a good yard

somewhere around Minidoka or American Falls, and if he couldn't find it, I would take them to Pocatello; this was the day I ordered the cars; the next morning the office of the O. R. & N. Co. called me up and told me that they had good yards at Minidoka, and I told them that would suit me better because it was nearer Twin Falls to bill them there; and they were billed to Minidoka; these cattle were loaded on December 3, 1909; there were 398 head, 16 cars, 25 head in each car less two; 25 head of cattle of the size of these is a proper and usual load; H. H. Trowbridge, Joe Lonergan, J. C. Lonergan's brother, and myself went along with these cattle; the cattle were loaded and ready to leave Baker City at 7:45 o'clock P. M., on Dec. 3, 1909, and we left Baker at 9:05 P. M. and arrived at Huntington at 2:30 A. M., Dec. 4; well, when I reached Huntington, I went over to the depot and asked the yardmaster what time we would get out; he said he couldn't tell me but perhaps in an hour or an hour and a half he could tell me something about it; so I waited about an hour and a half and went to him again and asked him about it. He said he didn't think we could get out before morning sometime. I said to him: "Didn't you have notice of these cattle coming?" He says "We did have notice to ship the cattle upon arrival, but we have to send to Glenn's Ferry for an engine"; "have got no power here to handle the cattle"; he says, "just as soon as that gets here we will ship you on"; well, we left Huntington; ran good speed enough going along alright any more

than we were side tracked some places along about Ontario; I don't remember the places along between Ontario and Nampa; when we got to Nampa the conductor said he had some switching to do and told us to go to lunch, which we did; we left Nampa, the run was good as far as I could see, anymore than they were side tracking and switching; we left Nampa alright and went on somewhere around Mountain Home; there they were setting out cars or picking up, somewhere along in that locality this side of Glens Ferry along this side on good track, along this side of Glens Ferry, I can't tell where it was, they were doing some switching, some heavy jamming, they jumped hard enough to knock us all off our feet, knocked us around in the caboose, awful hard jams, switching cattle; that was this side of Glens Ferry, somewhere not over fifteen miles this side of Glens Ferry; we arrived at Glens Ferry at eight o'clock p. m. on December 4th; they asked me to release the feeding risk of these cattle there; I went in and asked them what time I would get out, that was a division point; they asked me and told me I would have to release and go on and I talked to a man, I don't know whether it was the agent or not, it was the man there and he said—I asked him why "you got time to go on, why don't you take me on without release, you are not going to take 36 hours to get to Minidoka"; he said: "I don't know anything about it, those are the orders I got"; I asked him "what for," he says: "I suppose a matter of protection, that is all I know about it, it is the orders

I got"; something equivalent to that; I signed the release, we left then Glens Ferry at nine o'clock; after we got out of Glens Ferry a little ways somewhere around King Hill we were side tracked and stood a long time and jammed and switched around and bumped the cattle, bumped around all the time for quite awhile; after they switched we stood; after they got through switching they stood for a long time, I can't tell how long, but for a long time, they went on somewhere towards the top of the mountain, the top of King Hill, that is what I call King Hill, there they side tracked again, jamming the cattle again and they jammed them all the way until we got, that is side tracked more or less all the way until we got to Shoshone; the train men told me that the reason for so much side tracking was that there was a washout on the Southern between Reno maybe between Ogden and Sacramento, somewhere on that line, and the passenger trains from Portland were going around that way, going to California; we arrived at Shoshone at 3:30 o'clock a. m. on December fifth; the brakeman came into the caboose and told us that the agent said the cattle must be unloaded for feed and rest; well, I went up with Mr. Trowbridge and Mr. Longergan to the depot station and asked the night man about it; there seemed to be a night operator there; he said he wasn't the agent; I asked him where the yards were; he told me; I went up to the yards; he said the dispatcher had said to unload them; I went up to the yard for the purpose of unloading the cat-

tle; I asked if it was only a short distance why they couldn't run on; he said "I don't know anything about it, that is the order"; we went up to the yard, went up to the chutes; there are two little chutes; looked at the corral, one pen, and seen it was too small to unload the cattle, went down in it, went right down the chute, went to where there were two little troughs, no water, froze up, I guess, I don't know what the matter was; went immediately back to the night operator and told him that if that was the yard we couldn't unload there because we couldn't unload the cattle; the corral was 85 feet wide and 125 feet long; I measured it afterwards; it would take four such yards as that to feed them cattle right and water; I went down to the night operator and told him to wire the dispatcher and told him what to say, that we couldn't unload the cattle and better take them on to Minidoka; he wired him, said he did, said the dispatcher said they must be unloaded there; well, I went out with Mr. Trowbridge and looked around town—a little town; woke up two livery stable night men; they said they had no feed they could sell; I inquired about other places, if they knew of any feed; they said they didn't; I went back to the station and told the night operator to wire the dispatcher that we couldn't get any feed; the corral wouldn't hold them, we couldn't take them outside, and better run them on at once; he said he would send the wire; came back the answer "cattle must be unloaded there"; then I didn't do anything for an hour or two, hour I will say, and I

asked him if I couldn't get a messenger boy, if he couldn't, and I would pay it, and let him go up and have the agent come down; he said he didn't want to do it until daylight; he would do it after daylight, and I waited until after daylight, and we got a boy and I sent him up, or he did, rather, to the agent; said the agent would come down about nine o'clock, and the boy came back and said the agent would be down soon, but he came back and was there just about nine o'clock a. m.; I told him the trouble I had had from the time I had left, and the trouble there was there, and asked him to wire the dispatcher and tell him how it was, and run these cattle on to where they could get something to eat, feed them and rest them; he said he would and he wired him and he said the dispatcher—came back and he says the dispatcher says "if shipper doesn't unload cattle, you have them unloaded at once"; then I told him, I says "if you will—I can't unload them there; couldn't stand them on their heads and put them in them pens, but if you will put a man in charge of these cattle, Mr. Trowbridge, and we have a man Mr. Lonergan along, and we will hire such additional help as we require, and we will get feed out here at some of these farm houses a little ways out; you have them in charge and we will pay all expenses and deliver these cattle to the railroad for feed and water—rest them up"; well, he says "I have got my orders" he says; "I have an order to unload these cattle at once. I have to unload them. If you don't unload them I have got to"; he says "I

am not herding steers, I am working for the railroad company"; I says "all right, if you are not herding cattle go ahead and unload them"; in about twenty minutes he made up a crew he picked up around there of railroad men, run those cattle up to the chutes; they stayed around the chutes—Mr. Trowbridge, Mr. Lonergan and myself stayed and watched them, they stayed around the chutes between forty minutes and an hour then came back down; they left the train there and just came back down; a little fellow, heavy set man, the man in charge, I presume he was, talked to the agent probably two or three minutes, then he came over to me and said—; this little man was in charge of the train after we left Shoshone; well he said to me after he had talked to the agent, he said "if you will send a wire to"—naming the man, I can't remember his name, their division superintendent, or superintendent, or assistant superintendent, somebody in charge who had authority—"why we will run these cattle on"; he says "I am satisfied he will run them on"; he says "there is no yard at Minidoka"; he says "there is nothing there but a chute that ever I seen, for six or eight months"; he says "there was some little yard there, they burned down"; I says "if it will do any good, you write out a wire to this man and run the cattle on; take them to some place where we can unload and feed them; have to do something right away"; so he wrote out some kind of a wire to the agent and I signed it and in about thirty or forty minutes word came back to put an engine on and

take these cattle some place and unload them; when I started I said to the agent, I says, "no yards at Minidoka so this man says"; well, he says "Minidoka is where they are billed and Minidoka is where they will go"; that is all there was to it; the cattle went on to American Falls, never stopped at Minidoka at all; the railroad men couldn't unload these cattle at Shoshone, they didn't have a chance to; we left Shoshone at eleven fifteen a. m. on December fifth and arrived at American Falls just a few minutes after four o'clock that evening, probably three minutes after four; they ran the cattle across the Snake River there and stopped them; we went up to the yard, and they didn't run the cattle up for quite a little while; in the meantime we were hiring saddle horses and getting two or three men to help us; we had to take the cattle out, the yard wouldn't hold them; just a little yard or two, wouldn't hold the cattle, so we got men and saddle horses and unloaded them, part at a time and took them outside and held them and I got about a 30 or 40 acre pasture from a man by the name of Philbrick to run the cattle in that night, and I bought some hay at American Falls and had it scattered over the little pasture for the cattle; well, we commenced unloading the cattle at five o'clock; we unloaded the cattle between five and seven fifteen, about two hours, a little more than two hours unloading the cattle; Trowbridge and Lonergan and the men hired taking them out to this little pasture; it was only a short distance, probably half a mile, not that much; and I had

the hay taken out and scattered and after that we left the cattle and went to bed, stopped at a hotel called the Remington; the next morning Mr. Lonergan and Mr. Trowbridge were out ahead of me; they got saddle horses and I afterwards I went with them; I went up behind them; when I got up to the pasture I seen the cattle were all gone; I just followed up the river, there was 30 or 40 of them probably half a mile above the little pasture and they were scattered all along, I followed up about four miles and met Mr. Trowbridge coming back; he said Lonergan was up ahead and was bringing the balance back; he had seen some man there and had got a pasture there to put them in and he would take up the cattle from—he was behind you know, along down only a little ways from the pasture; so we went back and gathered them up and drove to the pasture and Lonergan brought down the others from the other pasture from above down the Snake River and we put them in this pasture, got them in sometime in the afternoon of the sixth of December; this was good pasture, lots of grass, lots of hay that had been raked up, good, and the boy, there seemed to be an old gentleman and his son and Mr. Trowbridge made arrangements with the son and the old gentleman kicked about it the next day and we bought hay from him and said that we could have the pasture until we shipped them; we kept the cattle in this pasture until December the ninth ten or eleven o'clock; they had all the feed and water they wanted, all they could eat; when these cattle reached

American Falls they were badly bruised and awfully bad shrunk, drawn, awfully drawn up and they was bruised and the hair was rubbed off lots of them; this condition was caused by bad handling and standing along siding along the railroad from Huntington to American Falls; from my experience as a cattle shipper, I would say that standing cattle on siding causes them to get nervous and restless, to fight, and lay down, get down in the car and tromp each other, jamming cattle causes them to get bruised, rubbed, they get down and rub each other, crowd up and skin up all the way along when they are jamming and unloading rough; if cattle go for a long period without food, rest or water, it causes them to get down, if you stand cattle, if you overrun them, if you keep them on cars too long, they were going to get tired, quite, and lay down and fall down and bruise up; they shrink away; they shrink all the time after they begin to bruise; if they get bruised up and sored up they begin to shrink and shrink fast; these cattle were in good condition when they arrived at Huntington, Oregon, all standing and all right; these cattle would be classed as a good bunch of Oregon cattle; they were red Durham four and five year old steers, a small per cent of threes, may be twenty-five or thirty head; cattle generally are classed as good, fine and very fine, medium and on down and feeders; these cattle would be classed, well, we figured about 75 per cent of these beef, Oregon beef; the kind of cattle we ship here to Portland and Seattle, that we do all the time,

grass beef, in the fall of the year; the balance of them were fleshy cattle; what we call killers, just kind of second class grass beef, killers.

“Q. Now what was done, if anything, at any time, between Huntington and American Falls as to paying the transportation for these cattle?

“A. I paid, at American Falls, I paid the agent there. Mr. Trowbridge and I did. We paid him the money for shipping the cattle to Minidoka.

“Q. What was done towards the shipment from Minidoka to American Falls?

“A. Nothing, none at all; just charged us the rate to Minidoka.

“Mr. ROBBINS: Just charged what?

“A. To Minidoka. We paid the regular tariff from Baker City to Minidoka, at American Falls.

“Q. Now, state if these cattle were shipped from American Falls. Were they shipped from American Falls?

“A. Yes sir.

“Q. Well, what was done in the way of entering into a contract for their shipment, if anything, and where were they billed to, if anywhere?

“A. We shipped them on December 9th at American Falls at 4:40; loaded out, billed out at 4:40 December 9th to South Omaha.

“Q. Where were they billed to?

“A. South Omaha.

“Q. Now, state when you left American Falls, if you haven't already stated, and take your run from

American Falls to South Omaha, and describe it to the jury.

"A. Well, the cattle were at 4:40 at American Falls to go, December 9th; this was 4:40 p. m., all loaded, billed, billing signed and all ready to go. I think a few minutes afterward we started; we ran for some time to some siding they called Banning—somewhere along there and side tracked for some purpose, I don't know what it was. And they side tracked again at a place called Bushod, this side of Pocatello; arrived at Pocatello at 10 o'clock, I have to look at my data, ten o'clock and something Pocatello 10:15 p. m."

Continuing, witness says: "We left Pocatello 11:30 p. m. December 9th, that is Pocatello time—not Pacific time; arrived at Montpelier at 12:20 p. m. December 10th; left Montpelier at 1:10 p. m. same day. Arrived at Green River at 10:40 p. m. same day, December 10th. Left Green River, loaded the cattle at 3:40 December 11th; left Green River at 5:45 p. m. December 11th. Were stopped at Rollins for about three hours on a siding. Arrived at Laramie at 7 p. m., the 12th. Left Laramie at 5:35 p. m. the 13th—December 13th, and arrived at North Platte at about 5:30, western time, in the evening, Dec. 14th. We next fed at Valley, place called Valley, about 30 or 40 miles this side of Omaha. We stopped for feed, rest and water at the following places: We left Baker City at 9:05 December 3, 1909; arrived at American Falls at 4:40 December 5th. I won't say 4:40, a

little after four o'clock when we got in across the falls, but unloaded the cattle between five and seven, December 5th. Reloaded the cattle December 9th at American Falls at four, the last load was ready to go at 4:40 just a minute—yes, sir, 4:40 p. m., signed up and ready to go, American Falls, December 9th, and arrived at Green River at 10:40 December 10th; arrived at Green River December 10th at 10:40 p. m. and left Green River at 3:40 December 11th, and arrived at North Platte—arrived at Laramie at 7 p. m. December 12th. Left Laramie at 5:35 p. m. December 13th, and arrived at North Platte about 5:40 p. m. December 14th. Left North Platte—I haven't got the data on that. Left North Platte on the afternoon of December 15th. Left North Platte at 3:00 p. m. Dec. 15. They were loaded at North Platte at 1:00 p. m. The first load left North Platte at 3:00 p. m. Dec. 15th, and arrived at Valley at 10 a. m. the 16th. Held the cattle at Valley from ten a. m. on December 16th until six p. m. the December 19th. Then run from there to South Omaha. We fed them all they could—all the hay they wanted and at American Falls all the pasture and all the hay they wanted in addition to that, and at Green River and Laramie and North Platte and Valley all the hay they would take. They had all the water they wanted to take, at liberty to have all the water. The run from American Falls to some coal station called Memmerer, something the other side of Montpelier, was awful bad, they were side tracking, jamming the cattle, switching, picking

up, setting out cars all the time from American Falls to Montpelier it looked like all the time—every few minutes set out cars and pick up. It is 124 miles from American Falls to Montpeiler and it took us from 4:40 December 9th until 12:20 December 10th, 19 hours and something they were setting—picking up cars, setting out cars, and they said—I was kicking a good deal, they said that the passenger trains was coming around by Portland over the Southern Pacific from Ogden around this way to get to San Francisco, that there was a washout somewhere on that road. From Kemmerer they run right along to Green River. It was alright as far as I could see. We picked up some cars, some coal cars at Kemmerer and jammed the cattle awful bad. They said there was a coal famine at Chicago and they had to take cars of coal. The run wasn't very good from Green River to Laramie. They got up a few miles the other side of Rock Springs, Wyoming, and side tracked for an hour or two; they said they had a crippled engine; they jammed a good deal along until we got to Rollins, the next morning at six o'clock, and were held three hours on a siding; they went on all right, didn't make good time; they switched a good deal. We got along to a place called Medicine Bowl—I think just a little the other side of Medicine Bowl, Wyoming, and they knocked the cars awful bad switching; they smashed two of the steers out the car windows—outside of the door. Broke the door down, that is part of it; that is, we was two short—two steers short. One steer fol-

lowed along behind the train for quite a ways—followed us. Awful bad jams. Well, we got to Laramie that night and fed the cattle until the next day, and the run was fairly good to North Platte, and they stood us on a siding there and wouldn't release the cattle; wouldn't release them, stood us about 45 minutes over time; but the run wasn't bad at all, all right, and I took it up with the Division Superintendent and they gave me a good run—went right along. From North Platte to Valley,—I wasn't on the train from Valley to South Omaha. I have shipped cattle over the Oregon Short Line previous to this shipment a good many times for years, have made shipments within the last three or four years, usually in shipping a great many cattle from Montana points, Utah and Idaho to Portland, we have run cattle from Cash Junction in Utah to Huntington in 21 hours and a few minutes over; we run cattle from Cash Junction to Huntington in 24 hours and 26 hours; run cattle from Montana points to Huntington in 28 to 31 hours—along there. These shipments were all made over the Oregon Short Line. The cattle involved in this case weighed 1083 pounds, average, when they reached South Omaha. Their condition was bad, very bad. They were drawn; the cattle were all shrunk and drawn; they wasn't filled; they were bruised and there were hairs rubbed off of them in places; looked awful bad; just down and out; what you call stale cattle. I was in South Omaha on December 20th, 1909, and was acquainted with the market price and value

of cattle there on that day. I was acquainted with the conditions; see all the sales that day. I seen cattle sold there that day at five cents a pound that weren't any better than our cattle—the cattle I was in charge of—should have been in South Omaha. Our cattle would have been worth that on Dec. 20th if they had arrived at South Omaha with only the usual and customary shrinkage and damage of transit. Our cattle were put in a pen close, they were put in pretty close, they were bruised up pretty bad and they jammed them up close together. They were sold on the open market and brought \$4.27 a hundred on an average. In the condition in which our cattle reached Omaha, they were classed, a part of them for feed, 23 head, and the balance feeders, western beef, you know, is not classed as high as eastern beef. Grain fed sell sometimes three cents higher than western grass fed cattle, but generally the difference between western beef—between feeders and western beef, runs 25 cents a hundred pounds; very often feeders sell for as much as beef—western beef. I stopped with these cattle at Valley for the reason that I thought I could make the cattle look better, fill them up and make them look better; get a little more weight on them by turning them out to pasture there and feeding hay. Thought I could weight them up better—they would weight a little more and look a little better by holding off a day or two. Along the line of the Oregon Short Line from Huntington to Omaha the weather—it was in the winter time; a little snow; probably an

inch or two of snow along from Huntington—above Huntington. I don't know whether any snow in Huntington or not. I got in there at night, left the next morning. I don't remember. A little snow along up the Snake River all the way to American Falls, probably an inch of snow there when we arrived there, and from there on into the Bear River country, going across Green River, there was quite a—maybe two or three, three or four inches of snow. I couldn't tell anything about it, only right along on the car, but I think there was three or four inches of snow, and along through Wyoming the morning I got to Rollins, there was an awful blizzard, awful blizzard there in Rollins. Two or three hours standing there, I noticed. Cleared up some time that day. It wasn't bad long. Down at North Platte, Nebraska, there was four or five inches of snow, and I think on down the Platte River had some. No, no bad storms; quite a blizzard there in Rollins, that is blowing snow; quite a wind there that morning.

“Q. Now, another thing. When you arrived in South Omaha, what was done as to paying for the transportation of these cattle from American Falls to South Omaha, if anything?

“A. I paid the—I paid the freight bill in Omaha.

“Q. That is the freight from American Falls?

“A. From American Falls to Omaha.

“Q. Do you know what the rate was you paid? I mean was it the through or local rate.

“A. They charged me the local. I think it was

fifty—it goes by the hundred over there—57 cents a hundred, I think. I am not right sure. It is right there though, to Omaha with 24,000 minimum per car, I think.

“Q. What did you do with the two bills of lading that were issued to you? The one issued at Baker, Oregon, and the one issued at American Falls

“A. I turned the bill of lading in at American Falls—I turned it in at Omaha for tickets to return to American Falls; I paid my way to Minidoka and got transportation from there to Baker. The contract I turned in from Baker to American Falls or Minidoka billing.

“Q. Now, when you were at Shoshone, did you make any effort to be transported on from Shoshone?

“A. What?

“Q. Did you make any effort yourself to get the railroad company to pull you on from Shoshone?

“A. Didn't do anything else all the time I was there.

“Q. Did you have any conversation with anybody in authority there in regard to pulling you on?

“A. I spoke to the night operator two or three times until morning. Then when the agent came down, I talked to him until they pulled us out.

“Q. Did you have any conversation with the conductor there about it?

“A. Yes, sir.

“Q. What was that conversation you had with the conductor?

"A. When I first got there, he went up with me to the yard; he went up with me to the loading chute, the second time. I went out with Mr. Trowbridge first; we went up twice. The second time I went up, he looked them over, and he said it looked very small for us, and he said 'if I had authority I could pull you on, could take you on to Pocatello on time—within the limit, thirty six hours'. That is about the conversation I had with him. He went out ahead of us, pulled the same train out, less the sixteen cars, and went on.

"Q. What sixteen cars did he leave?

"A. The 16 I had.

"Q. And pulled out the train?

A. He pulled the train out, the same tonnage; didn't side track, but pulled them on after daylight—that is the load, less sixteen cars.

"Q. Now, in reference to the claim that you made, if you made any claim there before you arrived at Omaha, or after you arrived there. State what you did in regard to making a claim against the company for damages.

"A. Well, at Shoshone, I told the agent there—called Mr. Lonergan and Mr. Trowbridge, both my men with me; Mr. Trowbridge was interested in the cattle—told the agent there that the railroad company would have to—I was going to put in a claim and he notified them to that effect, for side tracking these cattle, and handling them bad from Huntington until the time I left there. And when I got to American

Falls, I told the agent there would be a claim against the company for damages sustained and injury to these cattle. When I got to Laramie City, I told the agent there that two steers jumped out the cars around Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha; after these cattle or about the day they were sold there, and I paid the billing freight—and talked to the agent there at South Omaha, and told him the same thing. That is the man I talked to.”

Continuing the witness says: “I can’t remember how much I paid out for feed at American Falls. I paid out the night we got in there, we got all the hay we could, I think about two tons, I paid twenty dollars a ton for it, baled hay, had it hauled out. The pasture deal out there Mr. Trowbridge paid for that, I don’t remember how much, I settled with him.

“Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

“A. Yes sir.

“Q. What is it? You may state what this is, Mr. Kidwell?

“A. It is a statement for claim that I put in against the O. S. L. and Union Pacific railways for injuries and damages sustained to the cattle.

“Q. You put that in here in Portland, did you?

“A. I did. Yes sir.

“Q. How did you come to put that claim in here at Portland?

“A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.”

Cross Examination.

The plaintiff on cross examination testified as follows:

I am engaged in the cattle business here in Portland at the present time; my concern is known as Kidwell & Caswell; have been buying and selling cattle in the northwest territory for a good many years; have had a great deal of experience in shipping over different railroads; have shipped over the Oregon Short Line for more or less for years; ship all the time over the Short Line for the last two years; I am pretty well acquainted with the conditions surrounding the shipment of livestock on railroads and know a few things about it; I have had lots of experience; Mr. Lonergan and Mr. Trowbridge bought this bunch of cattle out in the John Day country in the summer of 1909; they took them to Bear Valley; Now I am telling you what they done, I was not there; we took them to Bear Valley and put them in pasture, good pasture they had there; after which we kept them down in Sumpter Valley and in that country when

they were moved from Bear Valley; they were range cattle when Mr. Lonergan and Mr. Trowbridge bought them; I didn't buy them; we took them from Bear Valley to Sumpter Valley, that is between Bear Valley and Baker City; fed them hay there; I don't remember how long we kept them there; it wasn't long; we fed them at Ed Cole's place near Haines, ten or twelve days before we shipped; didn't pasture them, fed them hay in his pasture, we kept them in his pasture the last day or two, but he fed them hay, ten dollars a ton every day; the pasture wasn't very good, but the hay was good; fed them all the alfalfa hay they would eat, paid for it ten dollars a ton; at the time they were at Cole's place, I figure 75 per cent of them in my judgment was beef; they was the same kind of cattle we buy in the fall of the year and ship to Portland, the Sound and all around; we did not ship these cattle to Portland or to the Sound because there was more supply of cattle than the demand was; had too many cattle at that time, which is a common thing all the time except in the spring of the year; hay was pretty scarce around Haines at that time.

"Q. Didn't have anything but wild hay and fox tail?

"A. Did they? Yes, good hay—first class.

"Q. Is that good first class hay?

"A. That is excellent—first class.

"Q. Wild hay and fox tail?

"A. That isn't wild hay; this was alfalfa; good

hay, ten dollars a ton.

I know Cole pretty well, he knows how to feed livestock pretty well; he is not an expert, he never shipped much; once in a while he makes a shipment; he feeds a little bunch of cattle every year; I buy cattle from everyone; he has sold cattle from time to time, I can't say that I ever had a great many business deals with him; I bought his cattle once or twice or three times, maybe a dozen times; brought the cattle from Haines to Baker City the same day I loaded them out, December the third; got to Baker about four o'clock in the evening, I think; I talked with Mr. Daugherty, the agent at Baker City, about shipping the stock; I don't know Mr. Noback, the bill clerk; I know Mr. Daugherty; I have shipped three or four hundred loads of cattle there every year from Baker City; I don't know Noback at all; I executed the regular livestock contract there on the shipment from Baker City; that is my signature, yes sir; that is my signature also on the back of the contract; I put the first signature on the that contract at Baker when I signed up the contract; the signature on the back for the return transportation I signed at Minidoka; I paid my fare from American Falls to Minidoka; I don't know anything about how the stock were billed out of Baker City, except that it was the regular stock contract, that is all I know about it; I had it billed to Minidoka; yes sir; I did not have it changed, I paid it up and got two billings; I don't know anything about those way bills at all; two contracts, I paid them the money

there at American Falls and signed another contract; these cattle were good Oregon steers, grass beef, Oregon steers; I think they would have an average weight of 1250 pounds a head, say 1260 or 1270; no sir, the complaint is not necessarily wrong, I didn't put it in for a lawsuit, I put it in to get settlement; I believe they weighed more than 1250 pounds; each; I never weighed them; I believe they will weigh more than what I say; they weighed that much when I loaded them at Baker City; it is a guess as to how much they would weigh there, of necessity it must be a guess; some of them might weigh less than 1250 pounds, and I think some of them would weigh more than 1300; one of them weighed only 900 pounds at Ohama; they are just the same as we buy every fall in Oregon and ship to Portland and the Sound markets for beef; 75 per cent of them is what I said; I did not say they were fair Oregon beef; good Oregon beef steers is what I said; good, grass fed steers, grass beef, is what I said; the cattle were not billed out of Baker City by weight, so much per car, the tariff is so much to Minidoka; I don't know what the minimum weight was; I don't know anything about it; never heard of any billing out of Baker City at minimum car at all until you strike the Short Line; on the O. R. & N. it is so much per car; on the Oregon Short Line, but Missouri River points is by weight; I have always understood so much per car to Portland; Short Line was so much per hundred; Short Line west is so much per car, regardless of weight; yes sir, the

Short Line, I have shipped over it, was so much per car, Minidoka to Portland, so much per car from Utah to Portland; I have had a great many years experience shipping stock and yet know nothing about a minimum rate applying to a car of stock coming west; going east, I have been mixed up, I don't always follow every shipment that goes east or west, I am not a cattle shipper, I have done a lot of it, but I am not shipping cattle; I bill cattle out just as you would buy a ticket or someone else would; I don't always look at the contracts or stipulations; these contracts change every so often; I can't tell; they don't show us only one billing; it is made up and we sign it; that is all there is to it; we fed first at American Falls.

"Q. When you left Baker City what did you intend to do with this stock?

"A. I intended to take them to Idaho and feed them hay, and some time later ship them off, if I didn't sell them; might sell them; might ship them on to Omaha or Missouri River.

"Q. In other words, you were going down to the Minidoka country to range them a while?

"A. I was not.

"Q. Well, you were going to feed them you said?

"A. If I had wanted to turn them out, I would have kept them at home where we had ranges.

"Q. Didn't you just say you took them down there to feed them hay?

"A. Feed them hay in the winter time.

"Q. As a matter of fact, when you got down there

you found there was no hay, didn't you?

"A. No.

"Q. Did you find plenty of hay at American Falls?

"A. I found hay I could buy at American Falls. I wasn't near Twin Falls; I wasn't there because they had no yard.

"Q. I didn't say Twin Falls.

"A. I found hay at American Falls; could buy it, too.

"Q. You say the hay was plentiful and the price reasonable?

"A. No, I didn't say plentiful; they offered me hay there at six dollars a ton.

"Q. Good hay

"A. Well, I couldn't say good hay; no, I couldn't say that. I never examined it because I made up my mind to ship the cattle on.

"Q. As a matter of fact when you got down there you were considerably disappointed by the conditions, weren't you?

"A. Disappointed by the railroad company's, very much so.

"Q. I know; you put that in all you want to but don't answer my question until you get ready. Now, when you got down there you were considerably disappointed by the climatic conditions, weren't you?

"A. No.

"Q. Found everything all right to range stock down there, did you

"A. I wasn't looking for range; was looking for

hay, and found it if I wanted to feed them.

“Q. Did it storm or snow any while down there?

“A. Yes, a little snow.

“Q. How much?

“A. Probably an inch around American Falls; an inch and a half maybe.

“Q. You tried to get pasture in two or three places and failed, didn't you?

“A. I tried to get pasture above there, but the old gentleman kicked about it; we fed them hay until we got ready to ship them—decided to go on with them. Didn't try very hard to get pasture; would have got it if I had.

Continuing the cross examination, plaintiff says:

I met Mr. Evans who lives up there at American Falls once; I did not try to sell him these cattle; my men might have tried to sell to him or talked to him about it, I don't know; I owned a one-fourth interest in those cattle; Mr. Lonergan one-fourth and Mr. Trowbridge one-half; they had authority to sell if they wanted to; I don't know whether they tried to sell to him or not; the time I met Mr. Evans was about six weeks before than time; I never discussd these cattle with him; I came in there on the fifth and left on the ninth; would be four days from the night of the fifth until the evening of the ninth would be four days.

“Q. And when you rebilled, what rate did you say you got?

“A. I think it was 57 cents they told me. I am not

going to be sure.

"Q. They got you a feed in transit rate?

"A. No sir.

"Q. What rate did they give you?

"A. Gave me through billing afterwards.

"Q. Where from?

"A. Well, Union Pacific. I don't know who gave it to me. I got it.

"Q. Through billing from where, I say?

"A. From Baker City to Omaha.

"Q. That is just what I am trying to get at.

"A. They gave me through billing, not feed in transit; through billing, through shipment.

"Q. Through shipment?

"A. They gave me that; they repaid me on the basis of shipment from Baker City to South Omaha; that is what they gave me. I didn't ask for it; they gave it to me.

"Q. That is the rate you got and the rate you paid?

"A. No, not the rate I paid. I paid six hundred and some dollars more.

"Q. You got your money back?

"A. Well, they gave it to me."

Continuing the cross examination, plaintiff says:

After we left American Falls, our next feeding point was Green River; we got to Green River at ten something in the evening and left the next evening; our next feeding point was Laramie City; we got to Laramie in the evening about seven, I guess, and left

the next evening at about five something; the next feeding point was North Platte; we got there at five o'clock and left there the next day at three something; Valley, Nebraska, was the next feeding point; we stopped there to fill up the cattle; tried to, stopped about three days; I don't know how many cars there were in the train including our sixteen cars; awfully heavily loaded, I know that; they were long freight trains, most of them; might have been some places where they didn't have many because they were siding a good deal, side tracking to put in and out, I couldn't tell; they were big trains mostly; our cars occupied the position next to the caboose; I didn't have them put there, they always put them there; that is where stockmen usually want them, so that they can so that they can punch up the cattle; there is considerable slack in a long freight train, I know that.

“Q. And even in a freight train handled under the most favorable circumstances, there is bound to be lots of slack in that train?

“A. Yes, where side tracking and switching.

“Q. And the same thing when stops are made; the slack will run up on the train?

“A. Yes, if they are not pretty careful.

“Q. Well, it is almost impossible, is it not, to keep that slack from running in and out?

“A. No, it isn't impossible; we do it right along on the Short Line and O. R. & N. and Northern Pacific. All of them handle stock good if they want to.

"Q. You don't undertake to say you ever saw a long freight train start or stop with slack not running in or out, do you?

"A. No, no, but then not bad, you know; they don't jam together and knock you off your feet and knock the cattle down.

"Q. Now, about this side tracking. I believe you say they had a washout down south some place?

"A. No, I don't, only what they told me. That is all I know about it. I know there was an awful lot of passenger trains going both ways.

"Q. And by reason of these passenger trains going along you had to side track a lot for them, did you?

"A. That is what the man said was the cause of it, and the great coal famine in Chicago was another cause for taking on this coal.

"Q. Beg pardon?

"A. After we got to that station Kemmerer, where there was a side track, and jamming these cars; they said there was a coal famine in Chicago, and they had orders to take the coal, they said.

"Q. So that you were side tracked more than you should have been, and that was occasioned by this washout down south, and these cars being routed north?

"A. All I know, there was passenger trains; that is all I know, lots of them.

"Q. An unusually large number of passenger trains running through there, wasn't there?

"A. Yes, sir, there was."

Continuing the cross examination, the plaintiff says:

F. A. Robinson sold these stock for me at South Omaha at an average price of \$4.27 per hundred weight; 23 head of them sold for \$4.60; 329 head of them sold for \$4.30; oh, I can't remember just how it was with reference to 33 steers selling for \$4.00. I got an average, if I remember, at the time—I know they cut out the beef out of the bruised cattle; I know they cut out the beef and sold it; I know that; when we buy cattle we generally figure on a four per cent shrink; there is no four per cent on these cattle; where you have cattle and you weigh as you take them off the feed grounds, say seven or eight o'clock in the morning, they would be full of hay and water, and you would shrink them 4 per cent; that would be four pounds a hundred; on a 1200 pound steer, you would shrink him 48 pounds, or would stand him in a corral, very often stand for a shrink, very often drive—a drive of seven or eight miles, we call the equivalent of a four per cent shrink, but where the cattle are taken right off the feed, the shrink will be 4 per cent—figure four per cent shrinkage; we always sell on a fill; we calculate a fill—that is pretty hard to say now; you can't tell how they will fill; sometimes they arrive in good condition and fill all right; feel like eating; eat and drink lots which add to their weight; under usual conditions, I fill them forty or fifty pounds, might fill them four per cent, I don't know; just de-

depends on how much they will eat; that is all there is to it, and how much they will drink; generally consider stock shrink about as much—the biggest part of it the first ten or twelve hours; that the cattle are not used to the train and get very nervous has something to do with it; you can taken them and stand them in a corral and they will shrink in ten hours just the same; no, I don't think shrink as much; and stock fed on alfalfa will shrink more than stock fed on timothy; I don't know how much more; they will shrink more the first day, you know; the first day or two they will shrink more on alfalfa than on timothy; I believe cattle shipping, they will not shrink generally as much if feeding timothy hay, as a rule; there cattle were all horned stock; they were not any more frightened at the train than any other stock; same as all range stock that is shipped.

"Q. Well, all range stock is afraid of a train, when an engine comes up alongside?

"A. Yes, afraid of a train.

"Q. And they try to climb on top of each other, don't they?

"A. Oh, I don't know. They can't in the car; cattle, you know, standing will get nervous and fret and fight. Standing is the worst thing in the world for them.

"Q. And that is what you go along with your prod pole for?

"A. Yes, to keep them up.

"Q. So, if an engine comes tooting up to the side

of a stock car, they are going to get bruised, aint they?

"A. No.

"Q. They are not?

"A. Not necessarily.

"Q. Don't bruise them to climb up on top of each other?

"A. Yes, when they do that, but they don't pay much attention to it when loaded in a car, say 25 of them, twelve or thirteen hundred pound steers—don't pay much attention to it.

"Q. Now, shipping livestock on the train is rather a hazardous thing under the best of circumstances, isn't it, for the shipper?

"A. Yes, sir.

"Q. You are taking a good many chances. Isn't that right?

"A. In what way taking chances?

"Q. Well, hazardous—liable to lose out in a good many ways?

"A. I don't know; ship all the time that way. If people were losing out all the time, so much, they wouldn't ship, I guess. When run right, there is not much danger. You can figure just as near as any other kind of business, where they are run right.

"Q. Now, assuming, Mr. Kidwell, that sixteen carloads of cattle, as you have described, go from Baker City down to Minidoka and are there about four days—practically five days, and receive the treatment that your cattle received, and then go on down to Valley and are filled, and into South Omaha, a dis-

tance of approximately fifteen hundred miles, how much would the normal shrink be on that shipment?

"A. Well, I have never shipped any; I have shipped cattle—been interested in them, but I say I never kept any tab on Omaha; have shipped other lines; can tell a distance around a thousand or twelve hundred miles—anywhere from seven hundred and ten and eleven hundred, from Utah here; about the same.

"Q. Can you answer my question? You can give us a fair estimate on that shipment under those circumstances?

"A. I think the cattle would shrink from fifty to seventy-five or eighty pounds, where they were handled right. If these cattle were handled right and went into Omaha in good condition I figure the shrink on them should be included in fifty to eighty pounds, maybe a hundred. Somewhere there if were in good shape; might have been a hundred.

"Q. Somewhere within fifty and one hundred pounds, then shrink?

"A. Yes, I should think it would be that. I never shipped cattle there; that is figured, I kept no tab on it.

"Q. What did this shipment weigh when it got down to South Omaha?

"A. What did they weigh?

"Q. Yes, what is the total weight?

"A. I can tell you in this way; they averaged 1083 pounds; there were 396 head, but I can't call to mind the exact total.

"Q. That was 428,900 pounds, wasn't it?

"A. I think that is it.

"Q. That would make the average weight at South Omaha 1083, you say?

"A. Yes, sir.

"Q. What was the value of these steers at Baker City, per head?

"A. You mean what was the value of them?

"Q. What were they worth right there, before you loaded them on the car, per head?

"A. I don't know what they were worth there.

"Q. Well, what did you value them at when you shipped them?

"A. Oh, they was worth about four cents a hundred, I guess.

"Q. What is that valuation in the contract? Is that 30 or 50 there?

"A. Fifty it says. They put the valuation on themselves. They had all that done. They force you to do that with these contracts, you see—\$30.00 very often.

"Q. They ask you what valuation you want, don't they?

"A. They have only got one tariff, unless they stick you for three or four hundred; that is all they got; that is all they show you; they put it on \$30.00 and that is what they give you if they lose one.

"Q. Did you ever ask to look at any other tariff?

"A. I never saw any other except one contract. I know blooded stock—

"Q. You know under the law we are forced to take them?

"A. I don't know the law, but I know what they do, all right; know pretty well, too.

"Q. Did you ask for any other contract or any other rate?

"A. No, I didn't.

"Q. You took this one and shipped your cattle on it?

"A. Yes, have to take them or don't ship.

"Q. If you hadn't signed this, you would have had to pay a higher rate?

"A. Yes, an awful lot higher; they just fix it for you and you sign it like you buy a ticket.

"Q. So by signing this you got a lower rate than you would if you hadn't signed it?

"A. I don't know. I don't know anything about that, but I only saw one tariff.

"Q. Why, don't you know you would have to pay more if you hadn't signed that?

"A. I understand they have a higher tariff somewhere. I don't know anything about it. I never seen it, I say. That is the only one I ever saw—just one. They have it fixed for you and you sign it; if you don't sign it, you don't ship.

"Q. Anything to prevent you reading this if you want to?

"A. Yes, you can read it but you can't tell anything about the stipulations or those things.

"Q. In fact you know them all by heart anyway,

don't you?

"A. Oh, no.

"Q. Now, on direct examination, you said that you were familiar with the market price at South Omaha, December 20, 1909.

"A. Well, I was there.

"Q. Well, do you know anything about the market quotations for the previous days?

"A. Well, no. Western steers run 5 cents to 5½—along there.

Plaintiff, continuing cross examination, says:

I do not take the Daily Drover Journal from Omaha; but I keep pretty close touch; I know the Daily Drover Stockman; it generally gives you the right dope on stock; generally in all these papers, just about; I don't know whether you can rely on it or not, but in my experience the papers and market orders is about right; that is where I get my information; the Drover's Journal, in quoting price on my cattle would designate them as western beef steers; I can't remember the price of western beef steers December 16th, nor December fifteenth, nor the fourteenth any more than I seen it there at Robinson's; I was there on December twentieth the day these cattle were sold; I think the market price was about the same for a week or two there; I don't know whether my witnesses testified that the market price was higher or not; I was there; I am talking from my own point of view; it was, I think, about the same for a week or two there; the O. R. & N., now the O.-W. R. & N. runs

from Baker City to Huntington; the O. S. L., or Oregon Short Line Railroad Company runs from Huntington to Granger; and the Union Pacific Railroad runs from Granger, Wyoming, to South Omaha; I can't remember the weights that were shown on this shipment when it got in to South Omaha, per car; all I remember is the average of the steers; I can remember that very well; I wired it to Lonergan; I wired it that night and had it down in my book, just exactly what they averaged straight through, also the total, but I can't remember the total.

"Q. Each one of the cars showed a weight of 26,000 pounds into South Omaha, didn't it?

"A. I don't know anything about it what they show.

Redirect Examination.

Q. When did you get this \$600.00 you received and testified to?

A. I come right back from Omaha to Walla Walla; I lived at Walla Walla at that time, and I come right to Walla Walla and from Walla Walla right here. I don't know exactly. Just two or three days after I got here; there was a refund coming, six hundred and some dollars on this shipment on through billing, that is, they gave me the regular—made me pay just the price from Baker City to Omaha—regular tariff.

Q. You were asked about determining the weight of cattle where there were no scales, and stated that

you guessed at the weight of them. Now, what do you mean by the word "guess?"

A. Well, we—where you weigh up cattle all the time, you have a pretty good idea. In this type of cattle, yearlings, and two-year-olds, and three-year-olds, same country, same breeding, same range, and under the same conditions, you can guess right around ten or fifteen pounds of them, taking as a class—take them right along; you can guess four or five hundred of them easier than you can guess one; just take four year old steers they weigh about so much, and five year old steers, about so much. Where you are familiar with the size, you can tell pretty close to where they run.

Q. How did these cattle of yours fill?

A. They didn't fill good at all.

Q. How is that?

A. They didn't fill good at all.

Q. For what reason?

A. Because they was sore—they was sored up; cattle wont fill good when they are sored up; they wont fill good. It is like a sick man.

Q. Now, what do you mean by the word "fill?" How does this filling occur? What does it consist of? Do cattle increase in flesh?

A. No, sir, they don't increase in flesh. When you get them into the yard—any time that you start cattle they are not going to increase in flesh any after you start shipping, but you can get them in near the yard, might make them look a little better, take the

soreness out of them, get them near the yard. If you can get them hungry enough to eat and drink forty or fifty pounds of water and hay, you will have that much in your favor.

Q. That is what is meant by stockmen by "fill?"

A. Yes, sir.

Q. Is that the customary and general way of selling stock?

A. Yes, sir, that is the way we sell in the Union Stock Yards, Chicago, and everywhere else.

Recross Examination.

"Q. That is the reason our beefsteak costs us so much, is it? Now, Mr. Kidwell, you say they don't increase in flesh on the fill. Well, they don't decrease either in flesh in a short time?

"A. Oh, they are not going—any time you start cattle, they are not going to increase in flesh any; that is a sure thing, but it is a very common thing, you know, to buy cattle in the country and ship them in and weigh them on fill and get as much in the yard as you do in the country.

"Q. Let's not get away from the question.

"A. I thought that is what you wanted.

"Q. They don't decrease in flesh after the first two days, do they?

"A. Not no great lot, no. No, they wont decrease much in flesh after the first few days; not if handled right, they wont.

"Q. It isn't flesh they lose the first few days, is it?

“A. Not a great deal.

“Q. Well, in fact there is hardly any flesh that they lose, is it?

A. Oh, yes, yes, they do. We can just knock off forty or fifty pounds awful easy by standing on a siding somewhere ten or twelve hours, jamming around a little and then sell them. Yes, sir, they sweat that much out pretty easy.

Q. Can knock off forty or fifty pounds of flesh you say in how long a time?

A. Oh, they can do it in a day.

Q. In a day?

A. Yes, can do it in a day.

Q. You say knocking off fifty pounds of flesh, now; we are not talking about weight; we are talking about flesh, in one day you say?

A. Well, yes. They can shrink thirty to forty pounds in a day by standing.

“Q. In flesh?

“A. It will cause them to shrink.

“Q. I am asking if they will shrink forty to fifty pounds of flesh in a day?

“A. Might not shrink in one day, but any time standing on a siding will shrink it—if you have them two or three days longer, I will tell you that.”

H. H. TROWBRIDGE, being called as a witness on behalf of the plaintiff, testified as follows:—

I am engaged in the raising and buying of cattle in Grant County, Oregon; I bought the cattle in question here; I bought them over the telephone; a man

had 700 steers and I bought them over the telephone for myself, Lonergan and Kidwell; supposed to have seven hundred; the man was in Burns, Harney County, Oregon, when I talked to him, and the cattle were up in the mountains, on Emigrant Creek; well, they wasn't as good as we expected; they didn't come up to the contract, and we didn't take only what did come up to the contract; Lonergan and I went to cut the cattle out and we took only four hundred; I think they had six hundred and forty or six hundred and sixty, I am not sure; I know that we cut out two hundred and forty or two hundred and sixty head—out of the bunch; I mean by "cut out" that we took them out of the bunch, turned them back; after we purchased these cattle, they were delivered to us to Bear Valley, up thirty miles, I think; we pastured them there in a wild meadow pasture; good pasture; for about two weeks; and then took them to Sumpter Valley; pastured them there for a while and fed them hay when the pasture run down a little, we fed them hay; we then took them to Baker City; left them in a pasture outside of Baker a few miles for a couple of days, I think; then moved on to Haines; we had a wheat field that had been cut, but the down grain in it and seven or eight straw stacks, I think a thousand acres in the field; I don't know how long they stayed there; I left them and went home; I was in Baker when the cattle were loaded on the cars; I came back when they were shipped; these cattle were in good condition when they were loaded on the cars; they

looked as good as they did when we bought them; they were fine cattle, a good portion of them.

“Q. Have you been in the habit of buying and raising cattle in that particular section of the country over there?

“A. Yes, sir.

“Q. From your experience as a cattle raiser and buyer, could you estimate the weight of these cattle at the time that they were in Baker City?

“A. Yes, sir.

“Q. What would be that weight? What would you estimate that weight to be?

“A. About 1260 pounds, I should say they would weigh.

Continuing, this witness testified:—

I accompanied the cattle to American Falls; I did not go to Omaha; well, I didn't keep any notice of any time when arrived at the depot at any particular place; we shipped them in the evening from Baker; we got to Huntington and laid there until after daylight; they finally got us out of there and then finally got to American Falls after two or three days—fooled along the road with them; I couldn't tell you exactly when we got out of any certain place, because it was at night a good deal of the time, and the first time I was ever over the road and I don't remember the names of the stations and how long we stayed in each place; we were stood on side tracks lots; we would side track for a long time at different times; we would side track and switch; they would take on cars and

set out cars; at Shoshone they said we had to unload the cattle; we went and looked at the yard and told them we couldn't unload them; the yard wasn't large enough, so we told them we had to—we told them if we had to, if we could get hay and take them outside, we would unload them, and they wouldn't do that, and we said if we had to unload them, they would have to do it themselves, because we couldn't in those yards; if they wouldn't let us take them out, there was no question; they fooled around a while and run them up to the chute; they run them up to the chute and I suppose come to the conclusion they couldn't unload them into this yard, and come back, and Kidwell sent the wire, Mr. Kidwell sent a message and they sent it to some of the head men, and a little while afterwards they said they could run us, said they could run us on, and did do it, run us on and gave us a good run from there; I think the yardmaster probably, somebody, gave us a good run out of there and it didn't take us long to get to American Falls from there; when we arrived at American Falls the cattle were skinned up pretty bad, lots lame, drawn, looked bad; I don't know how long it took us to make the run from Baker City to American Falls; I don't know when we left Baker; Mr. Kidwell kept track of it, I didn't.

On CROSS EXAMINATION, this witness testified as follows:

Bought these cattle on Emigrant Creek, about half way between Burns and Canyon City; I said I bought these cattle over the telephone, but I did not say that

I had never seen them; I had seen about three hundred of them before; when they were delivered they did not come up to the contract, a certain amount of them did, what we took did; we took four hundred; I think it was six hundred and twenty head or forty head or sixty head, right along there; those below the specifications were a little small and not as fleshy as they should be; three year old steers didn't appear to have done very well; we took mostly four and five year old steers, but a few three; any three that was good, we took, but the largest steers were in good shape; we took them, and the youngest three year old steers, we didn't take.

“Q. You cut out the three year olds because they were young and thin, did you?”

“A. Yes, they didn't fill the contract.”

Continuing, witness says:—

We put them in pasture in Bear Valley; about 700 acres in the pasture; it was in September, I guess, or October, the first of October, possibly; the pasture wasn't burned up at all; it was a mountain meadow pasture; we left them in this pasture about two weeks, I think; four hundred head in seven hundred acres; finally fed them hay, I think, before we took them away; the last week I think we fed them a load of hay in pasture; wild grass hay; bought it of Phillips; the pasture belonged to Brown & Summerville; Phillips was running it; he had bought the hay; we then brought them to Sumpter; I can't call the man's name right now that owned the pasture; it was good; had

been nothing in it; it was not burnt up or dried up at all; no, it was swampy, a good deal swampy; I don't know how many acres were in the pasture, possibly 320; the cattle were there about two weeks; we kept them there for quite a while; we fed them hay for a week or so, I can't tell how much hay we fed, cannot give an estimate, no way of telling how much we fed; then we took the cattle down to Baker in Dan Shaw's pasture; this was a nice green pasture, mostly brush, don't know how many acres were in the pasture; I suppose, two or three hundred acres, I don't know; they were in there two days; fed no hay while there; there were 400 head; did not take them from there to Ed Cole's at Haines; took them to a pasture which we bought from Sam Baer near Haines; I don't know how long the cattle stayed in the pasture, I went home; did not see them again until we got ready to ship them; I guess that was December third, I don't know; I met them down a way; helped drive them to the yard at Baker; helped load them; and was with them down to American Falls.

"Q. Now, your estimate of the weight of these cattle at Baker City is purely guess, is it?

"A. Yes.

"Q. You didn't weigh them?

"A. No. Had weighed a good many other cattle though before I handled these.

"Q. You didn't weigh any of these though?

"A. No."

Continuing, the witness testified:

I think I noticed a good many passenger trains running around us; we stood on side tracks a good deal; I don't remember all that passed us; I don't know why they side tracked us; I suppose to let other trains pass; they side tracked us to let other trains go by; I did not know that there was a washout down at Reno; I heard a little of it; I might have known then that they were routing all the passenger trains over the north; I don't remember it right now; these cattle were all horned and were not very much afraid of a train; they were in a pasture at Sumpter Valley when the trains to Sumpter Valley went through every day; they was all feeding along within a hundred yards and never looked up.

“Q. When you put them in a car and bring an engine tooting up to the side of them, they are going to get scared, aren't they?

“A. Might get scared.

“Q. And getting scared they climb on top of each other, wont they?

“A. Not if loaded right, they wont.

“Q. What is to prevent them? How are you going to load them to keep them from climbing onto each other?

“A. They wont do it much if they are not loaded too loose. Of course, you can load them loose enough so they could, but if the cattle are loaded right, they wont.

“Q. How many do you load in a car then to load them tight enough to keep them from climbing onto

each other?

"A. About twenty five head.

"Q. About twenty five in a thirty six foot car, and they are tight enough so they can't climb on top of each other?

"A. Not bad.

"Q. Now, what were these? Thirty-six foot cars?

"A. I don't know. I suppose part of them was. That is what we ordered. Don't know what we got. I suppose part were thirty six foot.

"Q. You ordered thirty six foot cars?

"A. Always do. I suppose that is what Kidwell ordered. I suppose it is. I don't know what he ordered.

"Q. Do you know what capacity a 36-foot car has?

"A. No.

"Q. With average 1220 pound steers?

"A. No.

"Q. Well, horned cattle will injure each other more than muley, in transit, won't they?

"A. I should say they would, yes.

"Q. More dangerous to ship them, isn't it?

"A. Certainly.

"Q. If one of them gets down, something is going to happen? If one of them gets down, it is going to hook some of the others, isn't it?

"A. Not necessarily. Not always.

"Q. Are you able to say that this condition that you figured at American Falls was not caused by the inherent nature of the animals themselves?

"A. Question, please.

"Q., (Read).

"A. In regard to being skinned up?

"Q. Yes, and bruised?

"A. Yes.

"Q. Then I understand you to say that it is absolutely certain that you could ship this stock from Baker City to American Falls and they wouldn't be skinned up at all?

"A. They might be skinned up some.

"Q. Yes. Even under the best of circumstances?

A. They might be but their hips wouldn't be rubbed off and their tails, and they wouldn't be raw necessarily.

"Q. If one of these steers got down, the others might make him raw, wouldn't they?

"A. They might do it.

"Q. And if they got on top of each other and you weren't there with your prod pole, they might get crippled, mightn't they?

"A. They might.

"Q. Nobody could help that, could they?

"A. Not at that time, they couldn't. No.

"Q. And in all your shipments some of your stock gets down and gets hurt, doesn't it?

"A. Not all of them, no.

"Q. Pretty common occurrence in shipping sixteen cars of cattle fifteen hundred miles?

"A. I never shipped fifteen hundred miles before or since.

JAMES C. LONERGAN, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:—

I am one of the parties interested in this shipment of cattle; I am in the livestock commission business here in Portland; have been in such business for about four years; prior to that time I was buying and selling cattle for different Sound brokers for ten years, and before that I was handling and shipping cattle to Chicago and different places—Montana; I have frequently shipped Oregon, or Idaho or western cattle a distance of fifteen hundred miles; I can't say how many now; I have shipped several from Ontario to Omaha years ago, and one shipment from Huntington; Ontario is about 75 or 80 miles from Baker City, I think, I am not sure; I saw these cattle a few days before they were shipped; one load I weighed at Huntington and shipped to Omaha shrunk seventy pounds in actual weight; the natural or normal shrink in a shipment from Baker City to Omaha if properly handled would be anywhere from 60 to 75 to 80 pounds; I saw these cattle out in the interior at a place called Emigrant where Mr. Trowbridge and I received them from the party that he bought them from, about, I guess, a month, maybe two months before they were shipped; they were a very good lot of cattle; there were seven hundred cattle run up and we picked out a little less than four hundred, perhaps four hundred of them; I saw them again three days before they were shipped; possibly it was longer than that; I am

not sure as to the exact days; I saw them at Haines; they were in good condition; would be classed as just ordinary beef cattle; I have purchased similar cattle in this same part of the country for a period in the neighborhood of fifteen years; from my experience as a stockman in the purchase of cattle I can guess pretty close to what these cattle would weigh; especially a big bunch; I am used to handling big bunches; I always do that when I buy when I aint got a place to weigh them, can't have them all weighed; I estimate what they will weigh by looking at them; it used to be customary to buy that way altogether, but of late years, they are inclined to sell them by actual weight; when I say I can guess pretty nearly their weight I mean that I can guess within 25 or thirty pounds of what they weigh, within that, per head, I mean; the last time that I saw these cattle, I would judge that they would weigh 1275 pounds; they were mostly four and five year olds, probably ten per cent or less of them were three year olds; they were just like the ordinary range cattle in this country; they wasn't what we would call wild cattle at all; in fact none of the cattle any more aint as wild as they used to be in days gone by; they were crosses of Hereford and Durham, just ordinary Oregon breed of cattle, with the predominant feature Durham blood in them, that is Durham blood—breed predominating; I know nothing about this shipment after it left Baker, personally; nothing only the returns I got.

Cross Examination.

"Q. Your approximation of 1275 pounds per head is pure guess, isn't it?

"A. Well, the weight I would estimate them if I were buying them.

"Q. Necessarily a guess though, isn't it?

"A. Well, everything is a guess, I suppose, when you don't weigh it.

"Q. You might miss it forty or fifty pounds a head?

"A. No. I don't think I ever did in my life, late years miss it that much.

"Q. Didn't you say you could come within 40 or 50 pounds per head?

"A. No. I didn't say it. I said I could come within 25 or 30 pounds.

"Q. Then you might miss it 25 or 30 pounds on these?

"A. Yes, I might possibly do that.

"Q. Now, you say that these weren't wild cattle?

"A. No, they were not.

"Q. But they were ordinary range cattle

"A. Ordinary range cattle, such as we buy here in this country.

"Q. But ordinary range cattle in eastern Oregon is pretty wild when led up to the side of a locomotive, aren't they?

"A. No, I don't think they are and I have handled lots of them.

"Q. They don't get scared?

"A. No. I have loaded thousands of them.

"Q. And they don't try to climb on top of each other when a locomotive comes along side?

"A. I don't know as I ever drove them up alongside a locomotive.

"Q. Your cattle car has to go up against a locomotive once in a while, when loaded? t

"A. After loaded?

"Q. Yes.

"A. Oh, yes.

"Q. When that happens the cattle pile right on top of each other, don't they?

"A. No, they don't because they don't generally have room to pile on top.

"Q. And they don't hook each other with those long horns?

"A. If loaded right they wont hook themselves very much."

JAMES G. KIDWELL, being recalled as a witness in his own behalf, testified as follows:

By a "feed in transit" rate is meant the right to stop the cattle while in shipment from the point of origin to their destination; stop them and feed while in route; in Oregon, I think, they allow you six months; in Idaho it is a little longer; I don't know just how much; I think they use the same form of a bill of lading any more than they make a notation; you have got to name the point where you want to stop and feed in transit; this notation is written on the bill of lading, I understand; there was no notation of

that kind written on either of the bills of lading which I got in this shipment; at the place where you stop, you can hold the bill of lading, or if you use any transportation, you have got to turn it in for your ticket for the return of your men, but they have bills numbering from one to as many cars as are shipped, and they give you a bill for each car; you can ship them out one or more up to the amount you ship at such times, under the time limit; and when you reship, you turn those back to the company; there was nothing of this kind done on either of those bills of lading; if the cattle had been shipped through right, it would not have been necessary to stop and feed at Valley; I paid upwards of three hundred dollars for feed there, somewhere—three hundred and forty—three hundred and thirty or forty; I thought I could make the cattle look better and get a little of the soreness out of them before I put them on the market.

“Q. Now, I wish you would explain—I don’t think that was made very clear—why it was you shipped these cattle out of Oregon in the first place. What was the idea?

“A. I shipped them to put them on feed in Idaho, for the purpose of shipping them on to the Eastern market—Missouri River,—Omaha.

“Q. When were you going to ship them to this eastern market?

“A. Well, that was speculative. I intended to leave them on feed, speculating on the possibility of a better market.

“Q. Now, when you unloaded these cattle at American Falls, and when you passed other points on this road, why didn't you—why didn't you take the cattle off and hold them until you got a better market at Omaha?

“A. The cattle were sore, bruised, drawn, and I thought if I left them, I would have to hold them too long. It would be five or six weeks before I could get them back on feed like they was when I started with them, or like they should have been with good treatment.

“Q. What proportion of the injury that these cattle sustained was the result directly or indirectly of the handling on this side of Granger, and what proportion of it was the result of handling on the other side—other side of Granger, east of Granger?

“A. Well, it is hard for me to determine the real damage that was done on the O. S. L.; the cattle were all in and knocked out when they arrived at Green River; they were badly knocked out when they arrived at American Falls; they got some heavy jams on the Union Pacific, and some little stations—some sidings. I never figured that there was over from five to ten per cent of the damage was done on the Union Pacific.”

Continuing this witness says:

When I say the “OSL” I mean the Oregon Short Line; I can't say exactly how long it took us to run from Granger to Green River, because we went through Granger in the night time; I don't remember

just when we went through Granger; it is thirty miles from Granger to Green River and we were travelling pretty fast, going twenty five—twenty or twenty five miles an hour at least.

Cross Examination.

“Q. Now, Mr. Kidwell, I have cross-examined you once on this, but it is necessary to do so again. You paid the through rate from Baker City to South Omaha, didn't you? That is the rate you got?

“A. I didn't pay it, no sir.

“Q. Well, now, you got a refund of over six hundred dollars?

“A. They refunded me.

“Q. Which was the through rate?

“A. Yes, sir.

“Q. From Baker City to South Omaha?

“A. Yes, sir.

“Q. So it doesn't make any difference what the Feed in Transit rate was. You got the through rate?

“A. Refunded.

“Q. Now, do you know how long you are allowed to stop at a place like American Falls under the tariff?

“A. Where there is a feed in transit rate?

“Q. No, just ordinary stop?

“A. No, I don't.

“Q. It is 120 hours, isn't it?

“A. I don't know exactly.

“Q. Well, isn't that it?

“A. Well, if you were shipping through, I don't

know how long they would allow you to stop. That would be kind of up to the railroad company generally is.

“Q. Isn’t that the argument you put up to them to get this refund?

“A. No.

“Q. That you had to stop over 120 hours?

“A. No, sir. I didn’t put it up that at all. I put it up—I told them in Omaha what Mr. Daugherty had told me in Baker City, the misunderstanding as to the regular tariff from Baker City to Omaha feed in transit. I had some talk of that kind in Baker; he told me it was a hundred and some dollars more than feed in transit, if I paid the local to American Falls, or a little more to Minidoka on to Omaha; and he had no—couldn’t find any place where there was any feed in transit rate at any other place.

“Q. He told you they would adjust it at destination, didn’t he?

“A. No, sir. He didn’t.

“Q. Didn’t?

“A. No, sir.

“Q. You know, as a matter of fact, that is the way they did, anyway?

“A. Adjusted at destination?

“Q. Yes?

“A. Sometimes they do. A great many times they don’t. More times they don’t than do.

“Q. But in a great majority of cases they do?

“A. Well, I aint found it that way.

"Q. Do you mean to tell this jury you put in a claim on every shipment for a refund?

"A. No. Never put in a claim in my life unless they paid it.

"Q. In the majority of cases they adjust it, don't they?

"A. Well, I never had any occasion—there is no agent can amend any contract. This is the only claim I ever put in they that I didn't get—this one to date—always settled."

Continuing, witness testified:—

Valley is about thirty miles from South Omaha; I won't be positive about that; it is not far; I might have been interested in a good many shipments that went in there in years back; this is the first one that I ever went through with; this is the first shipment; I do not know that all stockmen ship to Valley and fill their stock there; I don't know whether they do or do not; I have never tried to find out whether that is the practice or not; I know that it is the general practice of stockmen to run their cattle right into the market as quick as they can after they start—get them on the market; I stayed at Valley about an hour; the cattle stayed three days—four; in the three days at Valley, I didn't put any flesh on the cattle; just filled them up; got a little soreness out of them; made them look a little better; might have filled them up a little; that was the reason I stopped there; I paid three hundred and some dollars; I don't know how much I filled them up; don't know as I filled them any be-

cause it is hard to fill a steer when he is bruised and sore up, but I could rest them up and I wanted them to look a little better; yes, I filled them up again down in South Omaha the day I sold, had them filled; I went to Omaha the day I left Valley.

“Q. You went to Omaha to feel your market

“A. Went to South Omaha.

“Q. Left the cattle in Valley until the market came to where you wanted it?

“A. I left the cattle in Valley until Monday night and shipped them out.

“Q. You left them in Valley until the market went up to where you wanted it—where it should be?

“A. I don't know as it went up. I wasn't looking for it to go up in a day or two.

“Q. You weren't looking for it to go down, were you?

“A. I don't know.

“Q. As a matter of fact, that is the reason you kept this cattle at Valley, wasn't it?

“A. No, it wasn't. I told you what I left them there for.

“Q. You weren't paying any attention to the markets in South Omaha?

“A. Oh, yes, all the time.

“Q. How is that?

“A. All the time, yes sir.

“Q. I believe you say now that you shipped your cattle down to Idaho for the purpose of feeding?

“A. Yes, sir, that is what we did.

"Q. And it was a matter of speculation how long you were going to leave them down there?

"A. It was.

"Q. Well, did you change your mind after you talked with Evans?

"A. No sir, I didn't talk to Evans at all.

"Q. When your men did then?

"A. Some of my men might have talked to him. Some of the men with me might have talked to him. I didn't.

"Q. Tell the jury why you changed your mind?

"A. Because these cattle were sore and bruised up and drawn in bad shape. I made up my mind, after talking with Mr. Trowbridge, that it would take us some little time to get them back on feed to where they was when—

"Q. Now, as a matter of fact—I beg your pardon, if you are not through, go ahead.

"A. We talked the matter over there and made up our minds the best thing to do was to run them into Omaha and sell them, and let some man who fed grain take care of them. It would take some time to get them in shape.

"Q. What was you talking with?

"A. Trowbridge—interested with me.

"Q. That is your partner in the shipment?

"A. Yes, sir. We both went out there for the purpose of coming back. He went that far. We was going to leave the cattle there on feed.

"Q. That man who testified here yesterady was

one of your partners too, wasn't he?

"A. Mr. Lonergan? Yes, sir.

"Q. As a matter of fact when you got down there you found a blizzard and feed very scarce and pasturage almost unobtainable, didn't you? Isn't that the reason you shipped to Omaha?

"A. No, I got lots of feed at six dollars per ton.

"Q. You say there was only one inch of snow down there?

"A. Something like that. Down at around American Falls.

"Q. Just one inch of snow?

"A. Might have been a little more, somewhere; just a little.

"Q. Now, how did you figure out that five or ten per cent of this damage occurred on the Union Pacific?

"A. I say it is hard for me to determine. I figure it out for the reason that the most damage was done on the O. S. L. between Huntington and American Falls, and American Falls and they call the station Kemmerer, where they jammed these cattle in taking 19½ hours run to Montpelier, side tracking and jamming all the way.

"Q. As I understand you have no real foundation; that is, just guess?

"A. It is hard for me to say just how much each jammed them. I can say I have the data of every siding where they stopped them every day or where jammed. Might not have jammed so many but in my

opinion they did.

"Q. That is what I say, it is just a guess on your part.

"A. Yes, a guess. I couldn't tell exactly but I wouldn't say over five or ten per cent—

"Q. You got a good run—

"A. At the most not over five or ten per cent.

"Q. You say you got a good run from Granger to Green River?

"A. Well, from the place where they loaded some coal and jammed around there for quite a little while, and I had kind of a row with the conductor, and he said he would run them cattle and give me a good run from there on, and without question he did.

"Q. He gave you a good run?

"A. Yes, he did; 25 miles an hour.

"Q. What was your row with the conductor about?

"A. Because of the way they were jamming the cattle; been jamming them all that night and all that day—all the way along up the river and around Montpelier, and from Pocatello from 11:30. I was getting pretty mad—pretty sore. That was the row we had.

"Q. How long was that train you got a good run on?

"A. I don't know; there was enough of them. Meaning the train going down.

"Q. Yes?

"A. I think a good train; good tonnage.

"Q. Wasn't overloaded?

"A. I don't know as it was. Made good time is all I know."

Redirect Examination.

Continuing, this witness testified:—

There was no blizzard at American Falls; little skiff of snow there is all there was; cattle run right out in pasture; lots of grass; put them in pasture first, and the man kicked about it and we fed them hay to save his pasture.

FRANK LACEY, called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:—

I am a stockman by occupation; have been in the stock business all my life; I have never done anything else; I have bought stock and shipped stock from Moscow, Idaho, Pomeroy, Heppner, Arlington, Pendleton, Baker City—pretty nearly every shipping point on the line, Oregon and Washington; the stock I bought in Idaho and Washington went to Chicago; I have shipped stock from Baker City and Huntington to Omaha, Kansas City and Denver over the Oregon Short Line; I don't know how many shipments I have made; quite a few; haven't shipped any East since 1904; I was here yesterday and heard the condition of these cattle described at Baker City; these cattle I shipped from Pomeroy and Uniontown went into Chicago shrinking sixty pounds; they were grain fed cattle hard cattle; the distance these cattle were shipped would be six or seven hundred miles further than from Baker City to Omaha; I shipped cattle into

Kansas City from Baker City and Pendleton and Hep-
pner; they didn't shrink more than 70 or 75 pounds,
grass cattle, in July and August; Kansas City is rather
south of Omaha; I think Omaha is the closest; I aint
certain as to that; I heard the condition of these cattle
described when they reached American Falls; from
my experience as a stockman I would judge it would
take from 70 to 90 days with very good care to get
them back to where they was when they started; if
they are badly bruised and sore and crippled, some of
them never would get back; in all my experience I
ever had cattle are a whole lot better running than
they are standing; the air circulate through the car
for one thing; they are cooler; and when they stand,
why, they get nervous and restless; it is a whole lot
better for them to move along; I have bought lots of
cattle by weight where we had no scales to weigh
them.

Cross Examination.

On cross examination, this witness testified as fol-
lows:—

No, sir. I am not a commission merchant down at
the stock yards; I am not a member of the firm of
Hunt & Lacey; never had any connection with that
outfit; I am a buyer, order buyer, down at the stock
yards; I have never had any dealings with Mr. Kid-
well; just bought stock in the yards from him, that
is all; I have never had any misunderstanding with
the railroads down there over the shipment of stock;
never a dollar's worth; never put in a claim to none of

these companies, never a dollar; I know James Copeland of the O. R. & N.; he is the claim agent, the freight claim agent; I haven't shipped any cattle east since 1904; conditions have changed a great deal since then; we used to hold them on the train as long as we wanted to then; the railroads have taken out a great many curves and grades and have double tracked a great portion of that since then, I guess; they have put in the block signal system since 1904 on the whole line; the conditions in 1904 were entirely different from what they are now, but we got a whole lot better runs then than we do now; I know that; I will tell you the reason why; I shipped a train of sheep from Heppner, Oregon, to Fremont, Nebraska, and unloaded them once; that goes to show they were runnings some in them days; that was in 1897; how do I know, well, I tell you, you got to do your passing on one track, have one track, running two trains on one track now; business now twice as much as then; anyways only down in Nebraska getting to double track a little now.

"Q. Practically have a double track from here to Celilo, or Omaha?

"A. Not that I know of.

"Q. Practically have a double track every inch of the Union Pacific, don't they?

"A. I don't think so.

"Q. You don't know, do you?

"A. No, I don't know.

"Q. Then you are just jumping at conclusions

that they have too many trains for their tracks?

"A. I know the business is twice as much as it used to be then.

"Q. And for all you know the facilities are twice as much as then?

"A. You have bigger engines than then and they run slower.

"Q. Have bigger cars now than they did then?

"A. Yes, larger cars."

Continuing this witness says:—

I shipped some grain fed cattle from some place in Idaho to Chicago; they shrunk sixty pounds; that was the shrink in Chicago; I think we unloaded them about three times; we had our own hay, the company—that was in 1895, the spring of 1895, and the company furnished me a big furniture car, and I loaded my hay, the native hay that they had been eating and fed it right myself, and they don't do that now; they gave me the furniture car to take along; threw that in; I had a few hogs and I took grain for them; that shipment had extraordinarily good care; they had their own hay they had been used to eating; that is better than the usual care they get; grain fed cattle wont shrink near as much as other cattle; I have shipped grass cattle that only shrunk seventy pounds into Kansas City; that is late in the fall, you know, when they are pretty hard; they had been eating dry grass which is practically the same as hay; a grass fed animal will shrink a great deal more than a grain fed animal; a grass fed animal will not eat grain; it

takes some time to get them to it you know; alfalfa is not bad feed when they get used to it, just when they first start, if they are fed awhile on it they ain't so bad as when first put on it; of course, they shrink more on alfalfa than they would on wild hay; there would be some difference between an alfalfa fed animal and a grass fed animal; a little bit in favor of the alfalfa; in shipping from Eastern Oregon to Portland, I buy on a four per cent shrink, if I can; if I can't and want the cattle, and want the cattle, I take them the other way; they shouldn't shrink very much in addition to the four per cent, from thirty to sixty pounds, probably; I have seen them shrink a whole lot more than that; all according to the conditions when they are weighed, you know, but the average shouldn't be more than that, I shouldn't think; I say the average shrink; that would be about the average shrink, from forty to sixty pounds, including the four per cent; about sixty, sometimes shrink eighty pounds; I have seen them shrink eighty; this was beef cattle; a beef steer would shrink a little more than a feeder, I think it would, no, it wouldn't, there wouldn't be much difference, about the same; I have shipped from all the points on the O. R. & N. from Eastern Oregon to Portland; I have not shipped any lately; haven't shipped any for four or five years; haven't shipped any from Heppner lately; have shipped lots from Heppner; I think Heppner is about one hundred and eighty miles from Portland; we would get good runs, then we would get awful bad ones; the ordinary run from

Heppner is about twenty four hours; it takes twenty four hours alright; cattle shipped approximately two hundred miles on the train 24 hours will shrink between thirty and eighty pounds, or forty and eighty pounds.

Redirect Examination.

Continuing, on redirect examination, the witness testifies:

In a shipment of cattle, the greatest shrinkage occurs on the first shipment, the first unloading; I always found on the first shipment that they shrunk the most and they kind of get on their feed after they are shipped; get hungry you know and drink and eat.

JOE LONERGAN, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:—

I am a brother of James Lonergan who testified here yesterday; and who is interested in these cattle; I am foreman of the Union Stock Yards' horse barn; have been for a year and a little over two months; prior to that time I was shipping cattle for Kidwell and Caswell and J. C. Lonergan Company; have been connected with cattle—in the cattle business since 1881; I accompanied this shipment of cattle from Baker City to Omaha; we left Baker City, sixteen cars of cattle on December 3rd, 1909, along about—I didn't keep track of the time at all, Mr. Kidwell kept track of it, I think it was along about nine o'clock; around nine o'clock somewhere; we left Baker City on December third, 1909, as I said before, and we ar-

rived in Huntington around two o'clock the next morning, 2 a. m., and between Baker City and Huntington we were side tracked some; from Huntington on, we stopped on side tracks to let other trains pass, and some places quite a while, and the cattle in some places—we would do switching at Ontario, I think, and Nampa, they done some switching there, and they jammed them up in switching the cars in and out, and bumped other cars agin the cattle cars; when I was on this—lots of times on this—in this shipment I objected to them switching stock cars, but they said they had to do it sometimes; I objected to the railroad company switching the stock cars at those points where they were switching cattle—the stock cars around—switching them in and out—kicking them in and out as the railroad men call it; that is what they call switching cars; we arrived at Glenns Ferry; we stopped there about an hour or so, and then went on out of Glenns Ferry; we stopped a long time at—out near the end of the switch some place at the foot of Kings Hill; they was switching cars there and they was jamming the cattle a good deal, and they set out, I think, two cars there, one or two cars there; they had a heavy train; I asked the hind brakeman what was the matter and he said that they had too heavy a train; they said that the reason they couldn't make good time was because the train was too large, and they had to set out these cars and then they went over Kings Hill, and they side tracked two or three other places; it was night-dark; I

he got up; I saw him getting up; he got right in behind the caboose and trotted along the track and tried to keep up with us for quite a ways, half a mile or so; he found he couldn't keep up, the train kept going faster, he couldn't keep up, his wind gave out, and he stood right about crossways of the track; he held his head up pretty high and throwed his tail, like as if he was going across the prairie but the snow was too deep, I guess, for him, so he went back on the track the way we came, and I heard after that that the passenger that passed us about a mile down the track—(Witness interrupted); why, at Medicine Bow there, they stopped there to let a train pass, and I can't remember whether they sided or not; anyhow, there was a train passed there, and the engineer, in handling the air, he threw on the air too hard and threw the train together, and knocked us all off our seats in the caboose and broke this door, and piled up several cattle in that car—bruised up several cattle in that one car—in fact seven or eight cars; it shook them up pretty badly, I found out afterwards; the run from North Platte to Omaha was good; we had a good run; made good time; these cattle were fed at American Falls, Green River, Laramie, North Platte, and at Valley; I was there; they were well fed, and they were well taken care of at all these places; before we arrivd at Glenns Ferry, somewhere on the road, I can't remember just where it is, but there was a good deal of bumping of cars where they were handling, because of the air, the engineer not understanding the air; during

this trip if any of these cattle got down, I poked them up with the best I could and got them on their feet; all the way through made it a point to keep these cattle on their feet the best we could; some places they were harder to get up than others; they were footsore, and when they got down around between Shoshone and Glens Ferry they got pretty footsore, they had been shook up so much in the car; it seemed to me as if they was about 140 or 150 pounds less weight per head when they got to American Falls than when they left Baker; their condition was very bad when they got to American Falls; they was damp and footsore and was bruised up; I was at Baker when they were loaded; they were in fine condition there; their condition when they got to Omaha was good; was fed well at Valley.

Cross Examination.

On cross examination, this witness testified as follows:—

Yes, sir, I am a brother of the Mr. Lonergan who is one of the partners interested in this shipment; by reason of that fact I am not any more interested in this shipment than I would be for any one else—any friends of mine—I do not take any more interest in my brother's case than I would in anyone else's—any friend's of mine, anyone I worked for, anybody else I worked for; if I was working for anybody else I would take just as much interest; I did not work for Mr. Kidwell a great many years; I worked for Mr.

Kidwell a very short time; Mr. Kidwell and I are very close friends; I have known Mr. Kidwell for several years, but I haven't worked for him but a short time; my brother is not now a partner with Mr. Kidwell; I did not help to drive the cattle from Haines to Baker; I was at Haines; I intended to help drive the cattle from there, but I was sick that morning and went up on the train and went back with a saddle horse about a mile outside of Baker, started to help bring them in from there.

"Q. Now, after you left Huntington, you side tracked a good deal to let passenger trains by, didn't you, which were routed over the northern route on account of a washout?

"A. I don't know. I don't remember any washout. Might have been somewhere but these trains I know were let pass; I know we let lots of trains pass us.

"Q. An unusually large number of trains there, wasn't there?

"A. Yes, some places.

"Q. Well, most of the places, wasn't there, between Huntington and American Falls?

A. Yes, most of them big sidings.

"Q. And it is always the custom to side track a freight train for a passenger, isn't it?

"A. Yes—no, not a stock train; they side track—I have known them to sidetrack passenger trains that didn't carry mail for stock trains.

"Q. Where did you know that to happen?

"A. I know that to happen on the Short Line.

"Q. How long ago?

"A. A year ago this last winter.

"Q. What point was that?

"A. Well, I can't remember the point they side tracked there.

"Q. Did you ever know of another case of that being done?

"A. Oh, I have heard of cases of that kind.

"Q. Well, I want to know what you know about it?

"A. Well, that is all I know, what I heard about it. And I know of this one. That is all I know of.

"Q. Well, does a stockman ordinarily expect a passenger train to take a siding for him?

"A. No, sir.

"Q. It isn't the custom then?

"A. No. It is all on account of getting the stock in, probably on time. Passenger trains that is not carrying mail can be side tracked in cases of that kind; I suppose that is why that was done.

"Q. Well, all those through trains on the Short Line carry mail, don't they?

"A. Some of them don't.

"Q. Which one now?

"Q. Which one now? Which through train doesn't carry mail?

"A. Well, number five, they tell me, don't carry mail or didn't use to.

"Q. How long ago was that when five didn't carry mail?

"A. A year ago last winter.

"Q. How big a train did you have from Huntington to American Falls? Approximately how many cars, about?

"A. I don't know.

"Q. Well, you know whether you had ten or fifteen, don't you?

"A. I know how many cars of stock but I don't know how many cars they hung on.

"Q. Well, let's put it another way; was it a long train or a short train?

"A. It was a long train.

"Q. When you say a long train what do you mean?

"A. It might have been thirty cars or more or less.

"Q. Thirty or more cars then, on an average, in that train?

"A. Yes, sir.

"Q. You think. Now, there is a good deal of slack in a train isn't there when you stop it and start it?

"A. Yes sir.

"Q. And even if you start a train as easy as you can, it is going to make a bump on the rear end, isn't it—the caboose?

"A. No sir. No sir.

"Q. Now, explain to the jury how you can start a long freight train and not make a bump when you take out the slack.

"A. Well, just through their engine. I have seen

them many a time start their engine—start a long train—a man start a long train of cars of sixty cars just as easy as they would start a passenger train of eight or nine cars.

“Q. Where was the engineer?

“A. Over the Northern Pacific going down the hill from Stampede to Sisters.

“Q. That is with no slack in the train, when going down hill because the cars are all together?

“A. Yes, slack in the train.

“Q. How do you get slack in the train on the down grade?

“A. Why, when they left off the air they slack up and then go ahead again.

“Q. Well, when they let off the air, the train will run by its own momentum, don't it?

“A. What is that?

“Q. A car will run down the hill when you take off the brake, won't it?

“A. Yes, but some engineers taking a train down that hill, I know of, broke the train in two 32 times between there and Oroville.

“Q. That was over in the Stampede Tunnel country?

“A. Yes.

“Q. That is on a 4 per cent grade, isn't it?

“A. At Stampede?

“Q. Yes.

“A. I think so.

“Q. And that is just about as steep a grade as any

railroad operates over in the country?

"A. I think so.

"Q. So those conditions don't obtain up here on the Short Line at all, do they?

"A. Yes, sir.

"Q. Where is there a four per cent grade on the Short Line?

"A. I don't know about a four per cent grade, but they knock drawheads out of a stock train. I have known them to, and bumping cars a good deal.

"Q. They do that on every railroad in the country, don't they?

"A. Yes, sir.

"Q. Now, I believe you said the engineer didn't handle his air properly down there at one of these points. How do you know he didn't?

"A. I could tell by the way the train was handled, or by the way the cars came together.

"Q. How do you know but what somebody else ran into that train?

"A. I know there wasn't anybody else ran into it.

"Q. You know they wasn't switching up ahead there?

"A. Well, no one else only their own engine.

"Q. Are you an expert on air brakes?

"A. No sir, but I know when they turn on the air suddenly that it causes a jump.

"Q. Are you familiar with the New York Air Brake they use up there?

"A. No. I been with the engineer a good many

times and the engineer gave me a good many pointers on it.

"Q. What kind of an air brake is used up there?

"A. I don't know, don't remember. He didn't tell me what kind there were; I never asked that; a number of them.

"Q. You know so much about air brakes, you know the very best air brake will stick sometimes without any apparent cause, don't you?

"A. Yes, sir.

"Q. So it will stick when really not the fault of anybody?

"A. It will stick when there is cause for it, too, so they tell me.

"Q. Well, how about the brakes under the cars? Don't they stick sometimes?

"A. Yes, sir.

"Q. Nobody to blame for it—no apparent reason is there?

"A. Sometimes they freeze up.

"Q. Yes. Sometimes they get dirty inside the cylinder. A good many different things may cause them to stick?

"A. Certainly.

"Q. Now, when you got down to Shoshone and were talking about this yard, who did you talk to?

"A. I didn't do any particular talking about this yard. Mr. Kidwell and Mr. Trowbridge did the talking with these railroad people at Shoshone.

"Q. Oh, well, you don't know anything about it

then?

"A. Yes, sir, I talked with one man there; he talked to me about the yard.

"Q. Who was you talking with?

"A. I don't know his name. He is the yardmaster of that short line that runs up to Hailey.

"Q. Name Kimball?

"A. I don't know his name. He didn't tell me his name and I didn't ask him.

"Q. What did he have to do with the yard?

"A. I don't know, but he said that yard wasn't large enough to hold half them cattle.

"Q. Who had charge of the yard at that station?

"A. I don't know.

"Q. You didn't try to find out, did you?

"A. Well, sir, I was just along there to take care of the cattle and Mr. Kidwell and Mr. Trowbridge did the business with the railroad company.

"Q. Well, if you wanted to say anything about the yard at a station, who would you ordinarily go to?

"A. Go to the agent.

"Q. Well, did you say anything to the agent down there about this yard?

"A. What is that?

"Q. Did you say anything to the agent there about this yard?

"A. I didn't, no sir.

"Q. Then you don't know whether it was too small or not, do you?

"A. I could tell by the looks of them.

"Q. Now, how big were they?

"A. I don't know exactly how big they were. I didn't measure the yards or anything of that kind, but they didn't look to me as if they were big enough to hold more than 150 head, and then couldn't feed them in there.

"Q. About how big did they look to you then?

"A. About 125 feet across them.

"Q. About 125 feet by what, how wide?

"A. Oh, I suppose about 75 feet.

"Q. Seventy five feet?

"A. I don't know. Might be wider than that but I suppose that wide.

"Q. Now, how big were those cars you were shipping in?

"A. Thirty six feet long.

"Q. And how wide?

"A. They were eight feet and something.

"Q. Eight feet six?

"A. Eight feet six probably.

"Q. You had sixteen cars?

"A. Yes, sir.

"Q. As a matter of fact you know that that yard down there in 1909 would hold 20 cars of cattle?

"A. At Shoshone?

"Q. Yes, at Shoshone.

"A. In 1909?

"Q. Yes, in 1909. Don't you know the published capacity of that yard is twenty cars of cattle?

"A. I didn't know.

"Q. You didn't try to find out. You didn't try to find out, did you, what was there, did you?

"A. Well, sir, I didn't try to find out because they told me—the trainmen there told me, the yard men, whoever they were—told me the yards were too small to hold that amount of cattle.

"Q. Well, you didn't ask anybody that knew anything about it, did you?

"A. I don't know. I suppose these men knew about the yards.

"Q. Now, how many little pens was there in that yard?

"A. Well, there was one that I know of.

"Q. There was one little pen at the chute?

"A. One little pen besides the chutes.

"Q. How many chutes were there?

"A. Well, I don't remember now, there wasn't over two, I don't think.

"Q. And there was only one little unloading pen, is that what you say?

"A. Well, there was—I don't remember whether there was two chutes or one.

"Q. And how big was the cutting out pen there?

"A. Well, I couldn't say.

"Q. Do you know whether they had one or not?

"A. They had two pens there.

"Q. They had two pens. How big was the feed yard, do you know?

"A. I suppose 125 feet across it.

"Q. One hundred twenty five feet by seventy five?

"A. What?

"Q. You say the feed yard proper was 125x75—is that right?

"A. Well, I suppose that is what it is.

"Q. And how big were the unloading pens at the chutes?

"A. How is that?

"Q. How big were the little pens at the foot of the chutes?

"A. I don't know. I never measured them. I don't know.

"Q. Well, can't you give us an estimate?

"A. No, sir.

"Q. How big was the cutting out pen?

"A. I don't know.

"Q. So you don't know anything about this yard, do you?

"A. No, sir. I don't know much about them.

"Q. That is what I thought. That is the only reason you wouldn't unload there—because the yard wasn't big enough?

"A. Yes, sir.

"Q. I believe you said, Mr. Lonergan, it was cold and snowy when you got down to American Falls?

"A. No, sir.

"Q. You didn't. Well, I misunderstood you then. What did you say?

"A. I said it was fair weather there; was a little cold; not bad.

"Q. And no snow?

"A. A little snow, I said, but not very much.

"Q. I understood you to say it was nowing and raining the night you got there?

"A. No, sir.

"Q. I am mistaken about that, am I?

"A. Yes, sir.

"Q. Now, when you got down to Kemmerer, they set in some coal, I believe, you said? Set in some coal cars?

"A. Yes, sir.

"Q. Do you know why?

"A. No, sir.

"Q. Well, as a matter of fact, you know they were having a coal famine in the East, don't you?

"A. I didn't know it at the time but I knew it after I got to Cheyenne.

"Q. You know it now, don't you?

"A. Yes, sir.

"Q. They were doing all they could to get these cars east then. That is right, isn't it? Where was it this steer fell out of the car that you are talking about?

"A. At near Medicine Bow.

"Q. Medicine Bow?

"A. I think that is the name of the place.

"Q. How far is that from American Falls?

"A. I don't know exactly.

"Q. And what date was that? Well, how many days was that after you left American Falls; one, two, three, I don't want the exact time?

"A. I am not sure whether it was the eleventh or twelfth. I think it was on the eleventh—twelfth I think it was.

"Q. You think that was on the twelfth, you mean December 12th, do you?

"A. December twelfth.

"Q. Now, where were they switching after they left Medicine Bow? Where was this switching you talk about so long in there by Medicine Bow?

"A. Yes, sir.

"Q. Where was it?

"A. Where was it?

"Q. Yes.

"A. There was a siding near by there.

"Q. And what were you going into the siding for?

"A. I don't know as we went into the siding. I don't know as we did any switching there. I didn't say so. I said passed a train there and in starting the train—in handling the air there, they bumped these cars together.

"Q. So they wasn't switching there at that point?

"A. I don't know. I don't remember whether switching. I know we passed a train there.

"Q. Don't you know they have got a double track from Medicine Bow in?

"A. I didn't know at the time if they had. I didn't see any double track. I saw sidings along different places.

"Q. Now, I believe you said from American Falls

into Omaha you had a good run?

"A. Yes, sir.

"Q. I believe you said there was some bumping just before you got into Glenns Ferry.

"A. Yes, sir. Out of Glenns Ferry a ways.

"Q. How much of a grade was that?

"A. I don't know anything about it.

"Q. You had a pusher up there, didn't you?

"A. We went down a grade there, I know, fourteen miles outside of Glenns Ferry—into Glenns Ferry, there is a grade there.

"Q. Well, did you go up a grade near King Hill?

"A. At King Hill?

"Q. Yes?

"A. From Glenns Ferry?

"Q. Yes?

"A. Yes, sir.

"Q. How much of a grade is that?

"A. I couldn't tell, I have heard but forgotten.

"Q. Pretty steep, wasn't it?

"A. Yes, sir.

"Q. And it took a pusher to get up there, didn't it?

"A. I don't remember whether a pusher going up there or not.

"Q. When you have a pusher on it runs up the slack pretty lively, to get up those hills?

"A. There isn't much slack in a train going up hill when a pusher is on.

"Q. When it runs in the slack, I am talking about?

"A. I never noticed any slack.

"Q. I am talking about when you start there. There is slack in the train when you start up the grade, isn't there—you say you don't know?

"A. Well, I have never noticed any that night.

"Q. Now, as I understand your direct examination, you go along for the purpose of getting out at these different places and poking the cattle with your prod pole, and getting them up on their feet?

"A. Yes, sir.

"Q. And you had three men along for that purpose, didn't you—yourself and two other men?

"A. Mr. Kidwell and Mr. Trowbridge.

"Q. And that was the reason the three went along, wasn't it?

"A. Yes, sir.

"Q. And it is a very common occurrence for the cattle to get down, isn't it?

"A. Very common?

"Q. Yes?

"A. Well, they should ride right; ride all right when the train is moving; they don't get down. When the train is standing on a siding, then is when the cattle will fret and get down—get excited.

"Q. Every time you stop you go and look the cattle over?

"A. Every time I have the time, I always ask the conductor if I have time to go over, and if he says no, I stay in the caboose.

"Q. That is the reason you look them over. You are afraid some of them are down?

"A. Yes, sir.

"Q. You carry a long pole for the express purpose of jabbing them and making them get up?

"A. Yes, sir.

"Q. Now, any cattle get footsore when they are on the train a few days, don't they?

"A. Yes, without feed or water.

"Q. It doesn't make any difference whether they get food or water or not, does it?

"A. Yes, sir.

"Q. How does that affect their feet?

"A. What is that?

"Q. How does that affect their feet?

"A. Their feet?

"Q. Yes?

"A. Why, it wears them out. They have nothing in their stomachs to hold them up on their feet.

"Q. That gives them sore feet, does it?

"A. Yes, sir, makes them footsore—foot tired.

"Q. I believe you said you thought these cattle shrunk about 150 pounds at American Falls from their original weight?

"A. Yes, sir.

"Q. Didn't they shrink more than that?

"A. Well, they might have. They shrunk all of that anyway.

"Q. Mighten't they shrunk two hundred pounds there?

"A. I know they shrunk all of that.

"Q. All of two hundred?

"A. No, sir, 140 or 150 pounds.

"Q. All of 140 or 150 pounds?

"A. Yes, sir.

"Q. Was that all loss in weight?

"A. Yes, sir.

"Q. That was a loss of flesh, was it?

"A. Yes, sir.

"Q. I believe you stated on direct, Mr. Lonergan, that the cattle were in good condition when they got to South Omaha?

"A. Well, they were well filled up.

"Q. Well filled up?

"A. Yes, sir.

"Q. Good condition?

"A. They were as full—they were well filled as they could be. They were fed at Valley.

"Q. That is what you always stop at Valley for, isn't it?

"A. Stop there to rest the cattle.

"Q. Rest them and feed them?

"A. Yes, sir.

"Q. So you can put them on the market?

"A. Yes, sir.

"Q. Looking pretty good?

"A. Yes, sir, that is the idea.

"Q. And that is the common practice, isn't it?

"A. Yes, sir."

JOHN L. BURK, being called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:—

I reside at Portland; am engaged in the livestock commission business, and have been so engaged for nearly four years; I have shipped stock and been with stock that have been shipped about a thousand miles; have never shipped stock as much as fifteen hundred miles, but I have been with shipments that long; a bunch of steers weighing about 1250 pounds or thereabouts in good condition when shipped, would under ordinary treatment on a trip of fifteen hundred miles if they were well taken care of, shrink around eighty pounds—seventy five or eighty pounds; the effect of standing cattle in cars when the train is not in motion, well, from my experience, I would rather have cattle travelling ten hours than to have them standing five; if they are standing on a side track, they are jumping around and fighting—dropping down.

Cross Examination.

On cross examination, this witness testified as follows:

I don't know as ordinary milk cows would fight each other standing as much as wild range stock; there might be some difference; there would be some difference if the cattle were horned or muley; I think; they could do themselves more harm; it is absolutely necessary in shipping stock to have them stand on the side track at times, so that passenger trains can pass.

Redirect Examination.

On redirect examination, this witness testified:—

Most of the western cattle are horned cattle; in some sections they have horned cattle and in other sections of the country, why, they have muleys; nothing uncommon about shipping horned cattle.

FRANK W. BURK, being called as a witness on behalf of plaintiff and being first duly sworn, testified as follows:—

I reside at Portland; I am engaged in buying and selling cattle in the country and shipping to the Portland Stock Yards; I have been so engaged since there has been a stock yard in Portland, at this market, I have been engaged in the cattle business all my life; I have had experience in shipping cattle from Utah points, Idaho points and Wyoming points over the Oregon Short Line railroad; most of the shipments I have made from Utah have been made from Logan, Utah—Richmond, Utah; and I shipped these cattle to Portland Union Stock Yards in this city; I shipped them all to the Portland Union Stock Yards; well, I loaded the cattle at Logan, Utah, and we would run from there through Pocatello, Idaho; from Pocatello, Idaho, to Glens Ferry, and through Glens Ferry to Huntington without feed or water; and we would run from Huntington, Oregon, in all cases with the exception of one, to my recollection, in about 35 different shipments that I have in mind without unloading but once that I remember of; in other words, that would make two thirty-six hour runs, and in each case that would be within the limit, to Portland, Oregon; the average shrink per head on these cattle be-

tween these points and Portland, I would estimate to run between, on the cattle that I have handled, between forty and fifty pounds, at Portland, Oregon; I have shipped cattle from Idaho points to Omaha and Chicago.

"Q. Now, what would be your estimate on a shipment of steers of the average weight of about 1250 or 1260 pounds, range cattle taken from eastern Oregon range, and fed upon hay for sometime before shipment? What would be your estimate on the natural and usual shrinkage of such a shipment of cattle from Baker City, Oregon, to Omaha, Nebraska, if they received proper and usual treatment in that transportation?

"A. Around seventy to seventy five pounds."

Cross Examination.

On cross examination, this witness testified:—

I live at Twenty second and Broadway, Portland, Oregon; I have been a commission man at the Portland Stock Yards; I am not now; I am not connected with any of those commission firms down there at the stock yards; I was at one time connected with the Burk Commission Company and the Lonergan Company; Mr. Lonergan is one of the parties interested in this shipment; I am not interested in these cattle; I was in partnership with Mr. Lonergan in the commission business; sold the cattle to the stock yards on commission; I buy almost exclusively for the Portland market now; have been for the last three years,

three or four years, since this stock yard has been here; it has probably been twelve years since I shipped any stock to Omaha; circumstances and conditions surrounding the shipment of stock to Omaha are much better now than they were then; the railroad company at present are doing everything that I know of that—the railroad handling them are making an effort probably to get the shipments here without fail; handle them here in a better way; the only time I had a stock special was from Logan, Utah, in here; there is a stock special, I understand, coming this way, twice a week; I don't think they have a stock special on the Oregon Short Line; I should think the circumstances surrounding the shipments twelve years ago would be no criterion for shipments now; the same effort twelve years ago, and the same effort on the part of the company today would bring the same result; there is more traffic handling—more traffic, possibly, now than twelve years ago; I don't just exactly understand your question; I have not shipped any cattle to South Omaha within the last twelve years; I have shipped cattle from Logan, Utah, here every winter and every spring for the last three years; as to whether it is preferable to run stock 36 hours rather than 28 hours, depends upon the places you have to feed and water them in transit between the place you load them and the place you would be compelled to unload them; generally speaking I think stockmen differ as to whether it is preferable to run stock 36 hours or 28 hours without unloading for feed

and water; I would rather have cattle run 36 hours, provided they are moving all the time; it is generally the custom to run cattle 36 hours, where you can; you usually sign a release, provided you can get a good place to feed them at the end of the 36-hour run; sometimes, mostly, we buy cattle on a four per cent shrink; I have shipped grass fed cattle into this market; as to whether or not they shrink more than dry fed cattle depends on the circumstances under which you receive them; sometimes they do more and sometimes they do not; some cattle shrink more than others; it depends upon the character of the way the cattle are handled in transit; depends on the way the buyer receives the cattle, that buys them, and the feed that they would happen to get at the market they were turned over; I would say that there might be a little greater shrinkage under the same circumstances on grass fed cattle than on hay fed cattle; when I estimate the shrink of forty or fifty pounds, I made that as an average shrink on all the cattle I have handled in Portland to the best of my judgment, including the grass cattle with the fed cattle; I shipped these cattle about a thousand miles; and some of them greater distances; some from Green River, Wyoming, to Portland; I fed them in transit not to exceed twice that I remember of.

“Q. Would it make any difference in the shrink, Mr. Burk, if you took these cattle out at the feeding pen, and found the feed very scarce and very high, and put them in pasture where you had a couple of

inches of snow? Would that make any difference in the shrinkage?

"A. What time of the year?

"Q. December?

"A. Depends on the time that you might leave them there.

"Q. Suppose you left them there about four days?

"A. Without any feed?

"Q. Oh, no. Feed them some hay and some grass in the pasture for instance?

"A. Well, that would altogether depend on the condition of the cattle when they got there.

"Q. Yes, that is just the point. So that when you estimate the shrink, it depends entirely upon the conditions and the circumstances surrounding the shipment, doesn't it?

"A. I was asked the question as to how I would estimate the shrink. I estimated the shrink at 75 pounds a head from Baker City to Omaha; that cattle could be ordinarily and usually handled at 75 pounds shrink.

"Q. Yes, I know that and I know the answer, but I asked another question. It depends entirely upon the circumstances and conditions surrounding the shipment, doesn't it?

"A. Yes.

"Q. And it depends entirely on the character of the cattle, and the character of the care and the feed they get?

"A. And the handling of the cattle by the railroad

company in transit.

"Q. And by the man in charge too?

"A. Yes.

"Q. So, if the man in charge doesn't give them proper care, they will shrink more than if they had proper care, wouldn't they?

"A. The man in charge cannot give them proper care without the co-operation of the railroad company.

"Q. But suppose that he didn't?

"A. The man in charge ordinarily has nothing to do with the care of the cattle, while they are in transit on the cars; they provide the feeding places for them, and he always gives them the best care at the feeding places for the reason that it is to his advantage to do so.

"Q. Suppose the car stopped at the feeding place, and he wont unload, what is the railroad company going to do?

"A. For what reason wont he unload?

"Q. For reasons best known to himself. I don't know why.

"A. I would have to have his reasons before I could answer that question.

"Q. Suppose he arrives at the feeding point and says he wont unload because feed is very high and very, and he wants to be taken on to another point?

"A. If he arrived at a feeding point and he had ample space, ample room in the corrals to unload his cattle, and had ample hay in the corral or could get it

there to feed them with, and he had ample water in there to feed these cattle, and they had run the cattle long enough time to unload them, in my judgment, he should unload.

“Q. And if he didn’t he wouldn’t be giving proper attention?

“A. That would be my judgment.

“Q. Now, I believe you estimated the shrink on the same cattle moving from Baker City to Omaha?

“A. No, I did not. They asked me, I believe, what I would estimate the shrink of a bunch of cattle from Baker City to Omaha.

“Q. That was the purest kind of guess on your part, wasn’t it?

“A. No, sir—an estimate, not a guess.

“Q. What is the distinction between an estimate and a guess?

“A. An estimate, I would think, would be a conclusion arrived at by a man that knows something about his business, where a guess would count for nothing.

“Q. I see. This is an estimate you are making?

“A. Yes, sir.

“Q. On a shipment of cattle?

“A. I am answering—making estimates, yes, sir.

“Q. Over a road that you have never shipped over?

“A. Yes, sir.

“Q. You don’t know anything about this shipment in question, do you?

"A. What do you mean by that?

"Q. You didn't see these cattle, did you, that were shipped?

"A. I saw these cattle that were shipped.

"Q. Where?

"A. I saw them at American Falls.

"Q. At what time?

"A. About the time—I don't know about what time; at the time that they were there.

"Q. Yes. You didn't see them at Baker City, though, before they were loaded, did you?

"A. No, sir.

"Q. So you don't know anything about their relative condition at Baker City and American Falls, do you?

"A. No, sir.

Redirect Examination.

Continuing, witness testified:—

I saw these cattle at American Falls as they were loading them out; the cattle at that time looked to me to be drawn and in a drawn, hollow condition; I had no chance to observe whether or not the cattle were lame and sore; they were putting the cattle in the corral at the time I was there.

"Q. Now, you were asked about the effect it would have on a bunch of cattle if they were turned into a pasture covered with snow in the winter time, I will ask if the effect would be different if that pasture contained good grass and the cattle were fed all the hay they could eat while they were there.

"A. I would say that it would in no way damage the cattle.

"Q. You were asked concerning the duty of the shipper or the attendant of the shipment of cattle to unload at a given point, and they were able to unload. Suppose that the stock yard or corral at that point was not large enough to accommodate to exceed one-third or one-half of these cattle, and there was no water in the stock yard; no feed to be had in the town; what would you say with reference to the duty of the shipper under those conditions?

"A. Under those conditions, I would say that the shipper would refuse to unload the cattle and insist on going to a point in route where he could get ample yardage room and feed and water for the stock."

Continuing, this witness testified:

Why, it would take we ordinarily figure that it would take about, to let the cattle stand up to a rack it would take twenty three inches to the steer, where they put in feed racks to feed them; if there are no feed racks, it is almost impossible for any of the cattle to get the hay for the reason that they would tramp it into the ground; to feed, rest and water three hundred and ninety six head of cattle I would say that it would take a little more than 23 inches, but it would take additional water space to the 23 inches to the steer, provided there was a rack in front of each steer; in reference to the relative effect of letting the cattle stand in the cars after being loaded and running, I will say that the cattle are always in better condition:

they always stand up better, pile less and it is always to the best advantage of the shipper to have the train in movement, in other words to have the train moving; the minute the train stops the cattle begin to hook around or begin to move around; cattle get down when they are standing, where they will not—when the train is standing,—why they ordinarily wont get down when the train is running; for myself, I would prefer to have the cattle—I would prefer to have them run twelve hours longer than to have them stand five hours on a sidetrack; I think there is, if any, a very slight difference in the shrinkage of horned and muley cattle in transportation; these cattle which I have testified to shipping and upon which I base my opinion as to the amount of shrinkage were mixed horned and muley.

Recross Examination.

“Q. Now, Mr. Burk, speaking about this hypothetical corral again, where they refused to unload. Suppose the capacity of that was twenty cars, and a man had sixteen cars, would there be any excuse for him not unloading there on account of the size of the corral?

“A. That would depend altogether on how you would arrive at the capacity of the corral.

“Q. I am supposing that we have already arrived at that?

“A. I mean would be different. Sometimes you might be able to put twenty cars of cattle in a corral, but you might be able to get them into the corral, and

at the same time it would be utterly impossible to feed and water these cattle in the corral, even though they were there.

“Q. Well, suppose the regular capacity of the corral, stated by everybody, was twenty cars.

“A. Then what about it—what is the balance?

“Q. Would there be any excuse for not unloading on account of the size of the corral.

“A. I think that would be decided—that would be up to the man in charge of the cattle.

“Q. You think he would have a right to refuse to unload?

“A. Yes.

“Q. In a corral having a capacity for twenty cars and he had sixteen cars, because the corral was not big enough?

“A. Yes. If in his judgment the corral was not big enough; furthermore if the corrals had no water troughs in there and didn't have any hay.

“Q. Now, did I understand you correctly to say that it is impossible to feed the cattle on the ground in the corral, or do you mean it is just less desirable?

“A. Why, I don't mean to say it would be impossible to put hay out on the ground to them.

“Q. Well, isn't that the method in which they feed all the cattle when they are wintering them around through the country at different places? Feed them on the ground?

“A. The method of feeding beef cattle in the country, the method certainly is feeding on racks.

"Q. How about range stock?

"A. Range stock they feed on the ground, but they trail the hay out for a long distance, where the cattle can all get at it.

"Q. Not much of that hay tramped in the ground, is it?

"A. If muddy and the cattle were running over it, it would be tramped in the ground.

"Q. Suppose the ground was frozen and snow on the ground?

"A. If it was dry, and if for any reason the cattle didn't run on the hay they probably wouldn't tramp it in the ground.

"Q. The man in charge when he goes with the cattle usually rides in the caboose, doesn't he?

"A. No, sir—for instance in some cases I have ridden on the caboose, and then get off and get on the train ahead and try to arrange for feeding the cattle—a passenger train.

"Q. That is a passenger train?

"A. Yes, sir.

"Q. But on a freight train, you never ride in the car with the cattle, do you?

A. Sometimes a man—no, don't ride with the cattle; not as a rule you don't. You ride on the caboose. But sometimes you have occasion to go in the car, a stock car, and the train might pull out, or something of that kind and catch you in there—helping up cattle that were down.

"Q. But you never ride in the car with the cattle

between stations, as a general proposition, do you?

"A. As a general proposition, no.

"Q. Well, you have done that?

"A. I have done that, yes.

"Q. Where was that?

"A. In shipping cattle; I remember riding between Pendleton and Echo one time and between the top of the mountain and Pendleton, a part of the time in the car.

"Q. How many cattle did you have in that car?

"A. About twenty four or twenty five.

"Q. What size car?

"A. Thirty six foot car.

"Q. Thirty six foot and twenty four cattle. Where do you ride in the car? What position?

"A. I ride in the car, just on the end of the car; the cattle were in loose; pulled out the end door—pulled out the end guard to get into the car and helped up a steer, and I didn't get out of there. I didn't mean to say that I was riding with the cattle all day.

"Q. You were on the bumper then?

"A. I mean to say I have gotten in a car to help up a steer when the train would start off, and would stay there for length of time, and get out of there after the train would stop. That is all. I do not mean to say that I have ever preferred riding in the car as a matter of preference to the caboose.

"Q. No, I am not saying that, Mr. Burk, I asked if you ever do. Now, I believe you say the cattle don't fight as much when they are running as they do when

standing still on the side track?

"A. I believe I said that, yes.

"Q. But they always fight more or less, don't they?

"A. Some cattle do and some don't.

"Q. Well, range horned stock, driven 150 or 200 miles from a railroad would generally fight and climb over each other a good deal, don't they?

"A. They may. It just depends on the cattle.

"Q. Depends entirely on the cattle, don't it?

"A. Yes.

"Q. And even the gentlest cattle will fight and crowd each other, tramp each other, wont they?

"A. Sometimes.

"Q. And that is why you go along with a prod pole to keep them from doing it?

"A. No, generally go along with a prod pole—have the prod pole to get the cattle up when they are down.

"Q. And they get down as a result of fighting and climbing over each other?

"A. Not always. Sometimes cattle tire, and when they come to a stand still on a side track, the cattle will drop right down. As an illustration of that, the last shipment I had into Portland sometime ago, the cattle train came from Huntington to Portland, and the cattle just laid down and you would have to go around to prod them up with your pole.

"Q. What percentage of them were lying down, half of them?

"A. No, not half of them.

"Q. They can't all lie down at once, can they?

"A. No, I have never seen a car where all were lying down at once, no.

"Q. And if one or two are down, the others usually trample them, don't they?

"A. Yes, if they are down long enough.

"Q. Step on him and hook and bruise them up pretty badly?

"A. They might. Some instances, if one was lying down in the end of the car—it might lie down in the end of the car and not get tramped over; if it lies down and stretches out in the middle of the car, the cattle would naturally step on them and fight and trample them, when not in the end of the car.

"Q. There is always that danger in shipping cattle under the best of circumstances?

"A. There is some danger—some risk.

"Q. That is the reason you have a man along—

"A. Same reason we take—

"Q. Now, I believe you said that the cattle got stale after shipped quite a while?

"A. I don't believe I said that.

"Q. I beg your pardon, if you didn't. That is a fact anyway isn't it?

"A. I don't know what you mean.

"Q. Any cattle will look stale after shipped a long distance, wont they?

"A. Well, a man that is accustomed to shipping all the time and seeing cattle that are in transit all

the time, they may or may not look stale; sometimes they do and sometimes they do not.

"Q. Now, take a shipment from Baker City to South Omaha, for instance, if they went through on passenger train time, they will look stale, when they get to South Omaha, wont they?

"A. I saw a shipment that left Baker City or Ontario this winter, and they looked to me like cattle that never had been loaded at all. They were feeding in Pocatello.

"Q. They didn't look stale?

"A. Not to me, no sir.

"Q. Didn't look drawn?

"A. No, sir, looked fine.

"Q. Wasn't bruised up at all?

"A. No complaint on account of bruises.

"Q. How long had they been on the train?

"A. I don't remember how long. All I know they loaded at Ontarior and first feed they made was at Pocatello; they looked—we commented on the good condition of the cattle.

"Q. That is approximately almost two hundred miles, isn't it?

"A. The first load run out of there—

"Q. Approximately two hundred miles?

"A. Oh, whatever it was.

"Q. Suppose they had shipped them on about thirteen hundred miles more, do you undertake to say they wouldn't look stale and drawn there?

"A. I mean to say that they probably—to a man

that knows his business, that the cattle would show—wouldn't look as good as if moved only 200 miles.

"Q. Sure, that is what I am getting at.

"A. I didn't mean to say that.

"Q. So that cattle shipped a long distance, the cattle will look drawn and roughed up—on shipping a long distance?

"A. Sometimes they do not, no.

"Q. Well, will you tell us an instance where you can ship sixteen cars of cattle fifteen hundred miles and they wont look drawn?

"A. Yes, I can tell you an instance.

"Q. What was the instance?

"A. I have just stated you an instance. I don't understand your expression 'stale' and drawn.

"Q. Well, I am taking your expression for that. I ask you now what it means?

"A. I have shipped cattle in here and I have had them arrive here in good condition, and look to me and to a man who has handled cattle—they didn't look stale and did not look drawn. Other times I have had cattle come in here that looked drawn. All depends upon the condition, the way the cattle were handled in transit.

"Q. Well, I will ask you again and wish you would answer the question?

"A. I will be glad to.

"Q. If cattle are shipped fifteen hundred miles, the cattle under any circumstances will look drawn and stale, wont they?

"A. Not under any circumstances, no sir.

"Q. You say that is not a fact?

"A. Yes.

"Q. Now, I believe you said there is a difference in shrink between a horned animal and a muley animal?

"A. I don't believe I said that.

"Q. Well, what do you say about it?

"A. I said I didn't think there would be much of any difference in the shrink between a horned animal and a muley animal.

"Q. Then you think that horned animals don't hurt each other there in the car any more than muley animals in transit?

"A. I don't state that either. I don't want to give that impression.

"Q. Well, what do you state about it then?

"A. Naturally yes to that. It will be possible for horned cattle to go into the market and not shrink any more than muley cattle, but the horned cattle will go in—might be some of them bruised and some of the muley cattle would not be, provided each of them would fight in the cars in transit. That is what I say, and the shrink at the same time be the same.

"Q. You prefer to ship muleys to horned cattle, don't you?

"A. Well, I would rather ship muleys than horned cattle, yes, sir.

"Q. Why?

"A. For the reason that they have their horns off.

They might scratch themselves and might possibly bruise themselves.

“Q. Sure. They might horn each other?”

“A. They might, yes.

“Q. And the muleys can’t do that?”

“A. The muleys wouldn’t but that would make no difference.

Redirect Examination.

“Q. Counsel asked you if in every shipment the owner—the shipper didn’t assume some risk of deterioration in the animals. Isn’t it a fact that this usual or ordinary shrinkage of seventy or seventy five pounds is intended to cover that risk and does cover it?”

“A. The shipper always takes that into consideration when he buys cattle.

“Q. That is covered by the allowance of sixty or seventy five pounds?”

“A. It is.

JUROR: I understood the witness to say that these cattle were shipped from Baker City were half horned and the other half muleys?

“A. No, the cattle that I have shipped in my own experience—handled in my own experience were about half horned and half muleys, in arriving at the average shrink of between forty and fifty pounds.”

WILLIAM POLLMAN, being called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

I reside at Baker, Oregon, and have lived there for

the past twenty-three years; I am in the stock business, principally, and have been so engaged ever since I have been in Oregon; I have had experience in buying and shipping livestock, cattle principally; I shipped my first cattle in this country in '92, '91, or '92; have been so engaged ever since; in January, 1909, I made one test shipment of cattle from Baker to Kansas City, or rather from Nampa to Kansas City; I think about eighteen hundred miles, but I couldn't say because I am not familiar with the distances; these cattle averaged twelve hundred forty eight pounds; my shrink on that shipment was seventy-seven pounds to the head; and that was by actual weight at the loading point and where we sold them; these cattle were fed and watered, filled, at Kansas City, that is the usual custom; those are the only cattle that I have shipped East in recent years; I have had experience in shipping from Idaho points to Portland; in my opinion our shrink of seventy-seven pounds per head would be an average shrinkage on a shipment of cattle from Baker City, Oregon, to South Omaha, weighing at point of shipment 1250 or 1260 pounds average and having been Eastern Oregon range cattle and having been fed for sometime on hay before shipment, and having been driven from the town of Haines to Baker City where they were loaded before they were weighed, provided these cattle received the usual and ordinary care in such shipment; some might go a little more and some a little less, but I would consider that a fair shrink; it is the custom to feed

and water stock before sale unless otherwise agreed upon; cattle driven from Ed Cole's place near Haines to Baker City is not subject to any shrinkage at the weighing place; cattle driven ten or twelve miles, is considered fair shrink by the party selling and also by the party buying.

Cross Examination.

Continuing, on cross examination, this witness testified:—

I live in Baker City; these cattle on which I made this test shipment, were Idaho range cattle, fed at Nampa, fed sugar beet pulp and alfalfa hay; these cattle were part horned and part dehorned cattle; didn't ship by the way of Omaha; went over the Short Line and Union Pacific then to St. Joe, I think over the Burlington; I am not sure from there; I can't say; I couldn't say that the conditions are any different over the Burlington than over the Union Pacific; I don't know anything about that; I have never been over this road from the last feeding point, which is in Nebraska, to Kansas City; I would judge our cattle would have gone into Omaha much quicker, and with less time and one less feed than they would have gone into Kansas City, because we fed four times; I saw these cattle of Mr. Kidwell's before they were shipped; they were good Eastern Oregon range cattle; what we would call the average class of our country; I would say that they are good average; good cattle, you know; I couldn't say how these cattle of Kidwell's

compared with the cattle I shipped as a test; this shipment was what we would call our fall cattle; these cattle had been fed up to January; there was some beef among these as I saw them; I was not among these cattle to look at them close; I went by them, was by on the road and stopped and looked at them as they went along; I wouldn't be in position, unless I had gone through the cattle with a view of doing business with them, of giving an opinion that would be fair; it is the custom to buy cattle on a four per cent shrink where you take them right out of the feed lot and drive them right onto the scales, after they have been fed in the morning, to give them a four per cent shrink; it is the custom to sell on a fill where you ship into the market, into the ordinary eastern market, or into this market, unless otherwise agreed upon, your cattle are fed and watered before sold; the care and character of the cattle has a great deal to do with the shrink; if the man in charge did not give the cattle very good care and attention in transit, they would shrink a good deal more than they would if he gave proper attention; and if the railroad company didn't handle them rightly, they would shrink, no matter how well the man took care of them; we have had our best men take cattle along where we have got the worst of it simply because we couldn't take care of the cattle; then we have had other times when we had men that were no good went through and we had light shrink; one of those things you can't tell; the shrink depends upon both the care they get by the man in

charge, and by the way they are handled on the road, by both; both are equally responsible and equally responsible as to the condition and care the cattle would have, or the condition the cattle would be in at the end of the run; I figure a larger percentage of bruises ordinarily on horned cattle than on muley, for the same reason that you go in a corral where there are horned steers, you would be a little more afraid of them than you would if they didn't have horns.

"Q. Well, all cattle under any condition are bound to depreciate in shipment, are they not?

"A. In what way?

"Q. Both in looks and weight and value?

"A. No, I wouldn't say they would depreciate in value. In shipping your cattle, you don't shrink out any fat; if you have good quality in your cattle, you don't lose any of that.

"Q. That is you don't lose any flesh; it is just the filling that comes out?

"A. Cattle if they are handled well will come out in much better shape or in good shape than if badly handled or jammed around.

"Q. I am afraid you don't understand me. You don't mean to say that in shipping stock a long distance on the train they will increase in looks and value?

"A. No, sir.

"Q. So that it is a fact that all stock will depreciate in looks and value when they are shipped a long distance?

"A. No, I don't think they should depreciate in value.

"Q. You think they hold their own?

"A. Yes, they hold their own, as far as value is concerned.

"Q. Then why do you fill them at destination?

"A. Why do we fill them?

"Q. Yes?

"A. I don't say they don't shrink in weight."

The deposition of ALBERT NOE, heretofore taken in this cause at Omaha, Nebraska, was read in evidence as follows:—

I live at Omaha, Nebraska; am sixty seven years of age; have lived in Omaha for the past twenty five years; I am cattle salesman for Clay Robinson Company, South Omaha; have been so engaged for twenty five years; selling cattle a good deal longer than that; Clay Robinson Company do business in South Omaha; Clay Robinson Company do a heavier cattle commission business than any other firm there; I remember the sixteen carloads of cattle, 396 head, consigned by J. C. Kidwell to Clay Robinson Company which arrived about December 20th, 1909, at South Omaha; I sold them on the 20th day of December, 1909; I was looking it up today so that I could see the date; I knew that it was along the latter part of December; it was the 20th day; I sorted them myself—shaped them up and sold them, and I had a good chance to notice them; I observed them carefully; they were flesh mostly—some feeders; there was quite a num-

ber of the cattle that showed car bruises; they had to sell for less price than they do where there are no bruises shown; I do not remember anything else concerning the condition of these cattle other than what I have stated; when cattle are handled by commission firms at the stockyards, they are weighed at the stockyard scales; we have several places to weigh, and where we have lots of cattle and they are crowded we take the other scales; the stock yards company have a weighmaster who weighs them, but you can put them on the scales and weigh them yourself; the weighing is not done at any particular time; whenever we think they are ready for it to be done; the cattle are not weighed when they first come from the cars; no they are fed and watered and sold before they are weighed; I sold these cattle to Swift & Company and W. I. Stevens; I sold 57 head in two bunches and one single one besides to Swift & Company; taking them in bunches, I sold the first bunch of twenty three head weighing twenty-eight thousand seven hundred pounds to Swift & Company at four dollars and sixty cents per hundred; the next bunch was thirty-three steers, sold to Swift & Company, weighing thirty-eight thousand two hundred pounds at four cents a pound, and one other steer weighing nine hundred pounds to Swift at \$3.75 per hundred; we sold three hundred twenty-nine head to Stephens, weight three hundred fifty thousand four hundred sixty pounds at four dollars and thirty cents per hundred, and ten head to Stephens, weight ten thousand six

hundred forty pounds at three dollars and fifty cents per hundred; the total weight of all of these cattle was 428,900 pounds; I am familiar at all times with the market price and value of cattle in the yards at South Omaha; these cattle were sold at the market price on the day on which they were sold December 20th, 1909; I sold these cattle for the best price I could get for them in the condition in which they were; these cattle came from Oregon; I don't remember the starting point; I figured up the other day what would be the average weight of these three hundred and ninety six head of cattle in controversy in this suit when they were sold in South Omaha, but I don't remember now; it is merely a matter of computation, but I don't remember; those cattle would be classed as good fair Oregon; when they arrived there were a few that we could sell for western beef; we sorted them out, but there were few western beef—not many beef—they were lacking in flesh—a few possibly.

“Q. And how would the loss of from 160 to 167 pounds on each animal so shipped as described in the last question affect the market price in South Omaha per pound on December 20th, 1909?

“A. If it was shrinkage in flesh, it would affect it considerable, as they should not sell the same. They would have to be sold as feeders.”

Cross Examination.

Continuing on cross examination, this witness testified:

We have not sold a great many cattle from Oregon, lately; not the last few years; but we have sold a good many; cattle raised in that country wont average as high as cattle raised in other parts of the country; but we get some very high grade cattle from there; they don't average as high as those raised further east—not as high a grade; cattle are classed as to quality—good, choice and fair; the cattle in controversy in this case we call good fair bunch of Oregons; I consider that we got the market price for them on that day for that class; we classed them as fair and good; the market was a little bit higher on that day than it had been for several days before, not much compared with the third day before, that would have been Saturday and we don't have a cattle market on Saturday; I think, if I remember, the market was stronger than on Friday, but I don't remember just how much stronger; have not looked it up closely and don't remember exactly; there is a difference in classification of cattle if they are fat and thin, the fat cattle are called beef and the thin feeders; there is no significance to the term cattle; there are fat steers and fat heifers and we call them beef; feeders could be cows, heifers or steers; only a small portion of these cattle were sold as beef; we classed them as fair to good; there can be fair to good beef and fair to good feeders; we called them a fairly good bunch of Oregon cattle.

The deposition of J. T. SULLIVAN, having been heretofore taken at Omaha, Nebraska, was read as

follows:—

My name is J. T. Sullivan; I live at 1212 North 25th street, South Omaha; I am forty seven years of age; and am assistant cattle salesman under Mr. Noe for Clay Robinson Company; I have been so engaged for twelve or thirteen years; have worked for Clay Robinson Company since 1888; I was a hog salesman for them for awhile prior to the time I became a cattle salesman for them; I remember these 396 head of cattle in controversy in this suit; I saw them at South Omaha; these cattle looked stale when they arrived; they did not look like cattle that were fresh; they looked like they had been held at different places; their hair turned in like— that is what we term stale cattle; some of them were bruised; this condition affects the selling price; they don't bring the same price as fresh cattle; we have to sell them for less than fresh cattle, of course; the bruises would affect the selling price of the cattle, but of course, that would depend upon the kind of bruises they were; I cannot give the extent of these bruises, but the cattle were bruised some and showed rubbing in the cars; this would lower the selling price, of course; I have had no experience in shipping cattle from points as far west as Huntington, Oregon, or American Falls, Idaho; from my own experience I know nothing about the weight of cattle at point of origin, but cattlemen have often told me the weight of cattle at the point of origin; I don't know as I have had any experience in the reputed weight of cattle at a point of origin as far

west as Oregon outside of this particular bunch of cattle; I suppose I am acquainted with the reputed weight of cattle at a point of origin one thousand miles distant from Omaha; if the reputed weight at point of origin be 1250 pounds, the ordinary and usual shrinkage when they arrive at South Omaha would be about one hundred pounds per head on that weight of cattle; it might run less than that, it depends upon the cattle; I am familiar with the market price in the month of December, 1909; at South Omaha; I know what these cattle sold for; if these cattle had suffered only the usual shrinkage they having more flesh, they would have brought more money; they would have brought considerable more money—I couldn't say just how much.

Cross Examination.

On cross examination, this witness testified:

I am engaged daily in handling and selling stock at South Omaha; have been since the 20th of December, 1909; I do not attempt to remember every load of cattle that I have handled; I wouldn't say that I frequently receive shipments of cattle that have as many in as this bunch of cattle, but we do sometimes; I have looked up the records on these cattle; did not receive the best price for these cattle; any man can tell stale cattle from fresh cattle; I don't know whether or not there was a caretaker with these cattle; I did not see him; but I presume so; cattle that have been shipped fifteen hundred or two thousand miles are never as fresh as cattle that arrive from nearby points; they

are always more or less tired, but not necessarily bruised; we have a good many cattle come from that far and arrive in good condition; sometimes cattle shipped twelve and fifteen hundred miles to two thousand miles would show no more bruises than steers on a farm; a good deal of these bruises might have been caused in the pens; I believe so; they showed rubbing in the cars; all of these bruises might have occurred outside of the cars; they might have been bruised by driving them into the cars, or into the pens in the yards; and they might have been bruised while they were being reloaded at points where they were unloaded en route; possibly they might have been bruised being unloaded into the pens after they arrived in South Omaha, but the chances are that they were that way before they were unloaded at South Omaha; I did not see these cattle when they first arrived at South Omaha; I saw these cattle when they came from the chute; they are first taken from the cars to the pens; they are divided up and put in where there will be room enough; we do not feed them; we have no rule as to how many cattle shall be placed in a pen of a certain size, but we never crowd them and give them a fair chance with room enough to rest; cattle sometimes receive bruises and cuts after they are unloaded at South Omaha; after they are put into the pens they are sorted over and separated into beeves, feeders, etc.; possibly some bruises might be caused by cutting them out or sorting them.

JAMES G. KIDWELL, being recalled as witness

in his own behalf, testified as follows:—

“Q. I wish you would look at your memorandum and see just what time you were loaded and ready to leave American Falls, Idaho?

“A. Four forty p. m., December ninth.

“Q. You testified yesterday in your direct examination as to the dimensions of the stock yard at Shoshone, I wish you would state whether or not that was based on an estimate or on actual measurement?

“A. The last time I was there, I measured it; stepped the first time and measured the last; eighty five feet wide, one corral, 125 feet long; the runway across the outside or end 85 feet was fifteen feet outside. I have the diagram of it if you want to see it.”

Counsel for plaintiff here offered in evidence a pamphlet for the purpose of showing the distance between the various stations on the line of the defendant's railroad testified to and also map showing locations, which was received in evidence and marked “Plaintiff's Exhibit No. 1,” and which was and is in words and figures as follows.

Miles.	Station.
0	Granger.
8	Moxa.
16	Nutria.
25	Opal.
33	Waterfall.
39	Diamondville.
40	Kemmerer.
42	Moyer Junction.

Miles.	Station.
50	Fossil.
56	Nugget.
63	Sage.
72	Beckwith.
77	Pixley.
83	Cokeville.
92	Border.
98	Pegram.
108	Dingle.
115	Montpelier.
129	Novene.
136	Manson.
140	Rose.
145	Stockyards.
146	Soda Springs.
152	Alexander.
156	Way.
162	Bancroft.
170	Pebble.
177	Lava.
184	Topaz.
191	McCammon.
196	Onyx.
202	Inkom.
208	Portneuf.
214	Pocatello.
223	Michaud.
239	American Falls.
247	Coolidge.

Miles.	Station.
256	Wapi.
237	Minidoka.
289	Kimama.
304	Owinza.
314	Dietrich.
322	Shoshone.
331	Tunupa.
338	Gooding.
345	Fuller.
351	Bliss.
358	Ticeska.
367	King Hill.
374	Glenns Ferry.
383	Hammett.
385	Medbury.
394	Reverse.
404	Mountain Home.
415	Cleft.
425	Orchard.
437	Owyhee.
445	Mora.
449	Kuna.
459	Nampa.
468	Caldwell.
474	Notus.
483	Parma.
491	Nyssa.
494	Arcadia.
501	Ontario.

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459	Nampa.
468	Caldwell.
474	Notus.
483	Parma.
491	Nyssa.
494	Arcadia.
501	Ontario.

Miles.	Station.
505	Payette.
518	Weiser.
532	Old's Ferry.
539	Blakes.
541	Huntington.

Thereupon the defendant moved for a nonsuit as follows:

"Comes now the defendant, the Oregon Short Line Railroad Company and moves the Court for a judgment of non-suit upon the ground that a sufficient case has not been made to submit to the jury.

"First, whatever if any delay or shrinkage above the normal shrink, as shown by the evidence, was caused by circumstances and conditions over which this defendant had no control and for which a carrier is never held liable as a matter of law.

"Second, the plaintiff cannot recover for alleged extra feed bill at Valley for the reason that his witnesses testified that it was the custom to stop and feed cattle at that point in order to fill them up and rest them for the Omaha market. In any event, the defendant was in no wise connected with the delay at Valley.

"Third, no recovery can be had in this case on account of the alleged rough handling of the stock, for the reason that plaintiffs' witnesses stated that the jars and shakes referred to might have been the incidental jars and shakes incident to the operation of a long freight train under ordinary circumstances.

“Fourth, There is no evidence showing or tending to show that plaintiff’s stock was injured through the negligence of this defendant while in transit, and for this reason a verdict for the plaintiff would be founded upon mere conjecture and speculation.

“Fifth, Plaintiff failed to prove that he gave notices to the defendant of his alleged claim within ten days of unloading the stock at destination and before the stock had been intermingled with other stock, as required by the contract of shipment.”

Which motion for a non-suit the Court then and there sustained as follows:

“This complaint alleges that on the fourth day of December, the defendant railroad company received at Huntington three hundred and ninety eight head of cattle in good condition of a certain average value for transportation over the aforesaid railroad and the Union Pacific Railroad Company to South Omaha, Nebraska. That is the cause of action set out in the complaint; alleges that it was received for that purpose, which would make it, on the face of the complaint, a through shipment, and in addition to that it was so treated by the parties, because afterwards Mr. Kidwell applied for and received the return of his over payment. So, taking the complaint as it alleges, I infer that it is stated in the record as a through shipment, and if it was a through shipment, it was made under this bill of lading, because it originated at Baker City and was received by the defendant company at Huntington under this particular bill of lad-

ing, which was set out in the answer and admitted by the reply. So that I take it the question on this action, and the only question necessary now for the court to determine is whether or not the plaintiff has complied with the clause in this contract which required him to make a claim for damages within ten days from the date of unloading the shipment at destination and before the stock had been mingled with other stock. Now the only evidence in regard to that claim is the testimony of Mr. Kidwell that he told some of the agents along that line that he would have a claim, that he would put in a claim, or some language of that kind, but there is no evidence he ever did put in a claim, and I don't understand for a shipper to simply tell a station agent along the road that he proposes to put in a claim is a compliance with the provisions of this contract. That claim was to be put in in accordance with the terms of this agreement after the stock had arrived, and in order to be a claim, it seems to me it should specify in some way the nature and character of the damages, so the company might be prepared to make settlement if it desired to do so, or investigate it, but it isn't enough for the shipper to complain to the agents along the way that he proposes to put in a claim, unless he proceeds to do it. Under that Washington case, as I remember it, the claim was in fact put in but after ten days and it was a question of waiver, rather than failure to put in a claim at all, and the court held it was a case of waiver, the same as the case here of Kidwell & Caswell against

the Southern Pacific. In that case Kidwell & Caswell proved it was waived, because he took up the case and was put off from time to time. In this case there is no provision of that kind, and I don't see any other way."

I have examined with care this motion for a directed verdict upon the ground, among other things, that no claim for damages was presented by the shipper as required by the contract of shipment. Now, it is said, in the first place that there are two shipments—two separate shipments alleged in the pleadings and that the contract entered into at Baker City could apply only to the first shipment, or the shipment from Baker City to Minidoka. Now, the complaint plainly alleges a shipment from Huntington over the lines of the Short Line and Union Pacific to South Omaha; it alleges that the stock were billed to the consignee at Minidoka, it being the intention of the plaintiff, as known to the defendant to continue the transportation from Minidoka to South Omaha, and that when the stock arrived at Minidoka, what is now claimed to through to South Omaha. The complaint then alleges that during the shipment from Huntington to South Omaha, the stock were held in confinement more than 36 hours without food and opportunity to rest, and that when they arrived at South Omaha they were damaged to a certain amount, and a claim is made for the damages to the stock incurred en route. There is no separate cause of action set out in the complaint. It is not alleged that there was a shipment from Huntington to Minidoka and that certain dam-

ages occurred on that shipment, and that there was another shipment from American Falls to South Omaha and that certain damages occurred on that shipment, but it is alleged as one cause of action and as one continuous shipment over the Short Line and its connecting carriers, so that I am unable to construe the complaint in any way other than as one continuous shipment, and this is borne out by the testimony in the case and the conduct of the parties. When the stock arrived at Minidoka, what is now claimed to be the end of the first shipment, the consignee refused to unload them—refused to take them off the train. If that was the end of the contract, it was his duty to do that; the company was under no obligation to carry them any further for him except on one shipment, but he refused to unload them at that place because there was no proper stock yard for rest and feed, which implies he considered it a continuous shipment and a place should be provided—a place where they could be fed—and not the end of the contract of carriage. In addition to that, the proof all through the trial has shown or indicated a claim on the part of the plaintiff for damage occurring during the entire shipment, so I take it this must be held and construed to be an action to recover damages for the entire shipment and on one contract. Now, the shipment was made originally under a special contract, special agreement in which it was stipulated that unless claim for loss or damage or detention are presented within ten days from the date of the unloading of the stock at

destination and before the stock has been intermingled with other stock, such claim shall be deemed waived and the carrier and each thereof shall be discharged of liability. Now, this provision has been held by the courts of Oregon and by the courts generally to be a reasonable and valid stipulation and one that the shipper is required to comply with before he has a cause of action against the transportation company, and its purpose is manifestly to enable the carrier to make inquiry as to the amount of the damages in the first place—give him an opportunity to make inquiry as to the amount of the damages before the stock has been mingled with other stock; and in the second place, give it an opportunity to settle the claim if it is desired to do so without action, and under this provision, as I understand the law, the shipper cannot maintain an action until he makes his claim unless it has been waived by the action and conduct of the carrier. Now, many cases have been cited and my attention has been called to several cases holding that where the contract of shipment is to a destination off of the line of the initial carrier, at which time the initial carrier has no agent, certain stipulations in the contract are void because they are unreasonable. Now, in the Minnesota, Texas, Missouri and Illinois cases to which my attention has been called, the action was against the initial carrier and the contracts provided that the notice of claim for damages should be given to the agent of the initial carrier and before the stock was removed, and the courts held that this stipulation

was unreasonable and void where the destination was at a point not on the line of the initial carrier and at which the initial carrier had no agent to whom claim for damages could be made. In the Virginia case the contract provided that the claim must be filed with the carrier, according to law within five days, and the Utah case holds that a provision similar to this in this contract would not be presumed reasonable but the burden was on the railway company to show that it was reasonable in fact, and that is not in line with the decision in this state, nor, as I understand, in line with the general authorities upon this question.

Now it may be and is quite probable that under this contract, since the claim for damages must be made at the point of destination, that a claim made to the agent of the connecting carrier at that place would have complied with the terms of this contract. In other words, it is probable that this contract contemplated that the agent of the connecting carrier at the point of destination should be the agent of the initial carrier and any of the connecting carriers for the purpose of receiving a claim for damages, but in this case the evidence shows that no claim for damages was made at all. Mr. Kidwell says that he told the agents along the line, several of them, and I believe at South Omaha, that he would make a claim for damages, or that he would insist upon a claim, but he did not make any; he did not undertake to make any formal claim for the loss or damage, and as I view the law, that is a condition precedent to his right to maintain this ac-

tion, and under that view I am constrained to hold that the motion for a non suit is well taken and should be allowed.

To which ruling of the court counsel for the plaintiff then and there excepted, which exception was allowed by the court.

UNITED STATES OF AMERICA,

District of Oregon—ss.

The foregoing billl of exceptions contains all the proofs make, evidence adduced, and proceedings had, upon the trial of this action before me, R. S. Bean, Judge of the District Court of the United States for the District of Oregon.

And, now, that the foregoing matters may be made a part of the record, the undersigned, judge of the District Court of the United States for the District of Oregon, at the request of the plaintiff, James G. Kidwell, doth hereby allow, settle and sign, within the time allowed by the law and the order of this court, the foregoing bill of exceptions, and order the same to be filed.

Dated this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bill of Exceptions. Filed Sep. 20, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Petition

for Writ of Error in words and figures as follows,
to wit:

[Petition for Writ of Error.]

(Title.)

To the Honorable the Judges of the District Court
of the United States for the District of Oregon:

Your petitioner herein, James G. Kidwell, brings
this, his petition for a writ of error to the District
Court of the United States for the District of Oregon,
and thereupon your petitioner shows:—

That on the 11th day of June, 1912, there was rendered and entered in the District Court of the United States for the District of Oregon a judgment against your petitioner in favor of the above named defendant, the Oregon Short Line Railroad Company, that the complaint of your petitioner herein be dismissed and that said defendant recover its costs and disbursements from your petitioner herein taxed at \$256.85, and that execution issue therefor in an action theretofore begun and then pending therein upon a trial of said action and the sustaining of the defendant's motion for a nonsuit by the court; and your petitioner shows that there was manifest error in the record and proceedings had in said cause and in the rendition of said judgment to the great injury and damage of your petitioner all of which error will be made more fully to appear by an examination of said record and especially by the bill of exceptions by your petitioner tendered and filed therein and by the assignment of

errors filed herewith.

To the end, therefore, that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a WRIT OF ERROR may be issued directed to the said District Court of the United States for the District of Oregon returnable according to law and practice of the Court, and that there be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error, and all proceedings had in the said cause in which said judgment was rendered against your petitioner that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner, and that the judgment rendered in this cause may be reversed and held for naught and said cause be remanded for further proceedings, and that an order may be made fixing the amount of bonds in said cause upon said writ and for such other orders and process as may be required herein.

SHARPSTEIN & SHARPSTEIN,
and KING & SAXTON,

Attorneys for Plaintiff and Petitioner.

[Endorsed]: Petition for Writ of Error. Filed
Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. Dist. Court.

And afterwards, to wit, on Tuesday, the 3 day of December 1912 the same being the Judicial day of the Regular November 1912 Term of said Court; Present: the Honorable R. S. BEAN United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Allowing Writ of Error.]

(Title.)

Now at this time comes the plaintiff by F. M. Saxton, of counsel, and presents to the Court a Petition praying for the allowance of a Writ of Error in the above entitled cause and also presents with said Petition his assignments of error and moves the Court for an order allowing said Writ and fixing the amount of bonds to be given by said petitioner thereon.

Whereupon, it is Ordered that a Writ of Error in this cause be and the same is hereby allowed as prayed for in said Petition and that said plaintiff give a bond as provided by law in the sum of One Thousand Dollars.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 3 day of December, 1912 there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

(Title.)

Comes now the plaintiff and files the following As-

signment of Errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, to wit:—

I.

That the District Court of the United States for the District of Oregon erred in sustaining defendant's motion for a nonsuit upon the trial of said cause after plaintiff had introduced his testimony and rested.

II.

That said Court erred in rendering judgment against plaintiff and in favor of defendant dismissing said cause upon the completion of plaintiff's testimony upon the trial of said cause.

WHEREFORE, The Plaintiff prays that the Judgment of said Court be reversed and that said cause be remanded for a new trial.

SHARPSTEIN & SHARPSTEIN,
and KING & SAXTON,
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Bond in words and figures as follows, to wit:

[Bond.]

(Title.)

KNOW ALL MEN BY THESE PRESENTS,

That We, James G. Kidwell, and H. H. Trowbridge and J. C. Lonergan are held and firmly bound unto the defendant, Oregon Short Line Railroad Company, in the sum of One Thousand Dollars, to be paid to the said Oregon Short Line Railroad Company, its successors and assigns.

To which payment, well and truly to be made we bind ourselves, and each of us jointly and severally. and our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 30th day of November 1912.

WHEREAS, the above named James G. Kidwell has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled court entered by the District Court of the United States for the District of Oregon.

NOW, THEREFORE, the Condition of this obligation is such that if the named James G. Kidwell shall prosecute said Writ to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

JAMES G. KIDWELL.
H. H. TROWBRIDGE.
J. C. LONERGAN.

United States of America,
District of Oregon.—ss.

I, H. H. Trowbridge and I, J. C. Lonergan being

first duly sworn, depose and say: that I am one of the sureties in the foregoing bond, that I am a resident and householder within said district and that I am worth in property situated therein the sum of Two Thousand Dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

H. H. TROWBRIDGE.

J. C. LONERGAN.

Subscribed and sworn to before me this 30th day of November, 1912.

JULIUS COHN.

Notary Public for Oregon.

(Notarial Seal)

Examined and approved this 3 day of Dec. 1912.

R. S. BEAN,

Judge.

[Endorsed]: Bond. Filed Dec. 3, 1912.

A. M. CANNON,

Clerk U. S. Dist. Court.

And afterwards, to wit, on the 4 day of December 1912 there was duly filed in said Court, a Writ of Error in words and figures as follows, to wit:

[Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth District.

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.To the Judges of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean one of you, between James G. Kidwell plaintiff and plaintiff in error, and Oregon Short Line Railroad, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit

Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE,

Chief Justice of the Supreme Court of the United States this 3 day of December 1912.

[L. S.]

A. M. CANNON,

Clerk of the District Court of the United States for the District of Oregon.

By.....Deputy.

[Endorsed]: Writ of Error. Filed Dec. 4, 1912.

A. M. CANNON,

Clerk, U. S. District Court, Oregon.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Citation on Writ of Error in words and figures as follows, to wit:

[Citation on Writ of Error.]

In the District Court of the United States for the District of Oregon.

JAMES G. KIDWELL,

Plaintiff.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Defendant.

United States of America,
District of Oregon—ss.

The President of the United States to the Oregon
Short Line Railroad Company, a Corporation,
GREETING:

You are hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Oregon in the above entitled cause, wherein James G. Kidwell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White,
Chief Justice of the United States, this 3rd day of
December, 1912.

R. S. BEAN,
Judge.

Due service of the foregoing citation is hereby accepted in Multnomah County, Oregon, this 3rd day of December, 1912.

A. C. SPENCER,
of Attorneys for Defendant, Oregon
Short Line Railroad Company.

[Endorsed]: Citation. Filed Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 31 day of

December 1912 the same being the.....Judicial day of the Regular November 1912 Term of said Court; Present: the HONORABLE R. S. BEAN United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

JAMES G. KIDWELL,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COM-
PANY, a corporation,

Defendant.

December 31, 1912.

Now, at this day, for good cause shown, it is ordered that plaintiff's time for filing the record and docketing this cause on writ of error in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended ninety days from this date.

CHAS. E. WOLVERTON,

Judge.

No. 2247

In the

**United States Circuit Court
of Appeals
For the Ninth Circuit**

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

**OREGON SHORT LINE RAIL-
ROAD COMPANY, a Corporation,
Defendant in Error.**

BRIEF OF PLAINTIFF IN ERROR.

Writ of Error to the District Court of the United States
for the District of Oregon.

SHARPSTEIN & SHARPSTEIN of Walla Walla,
Washington, and **KING & SAXTON**, of Portland,
Oregon,

Attorneys for Plaintiff in Error.

P. L. WILLIAMS, of Salt Lake City, Utah, and
W. W. COTTON, **A. C. SPENCER** and **W. A.
ROBBINS**, of Portland, Oregon,

Attorneys for Defendant in Error.

STATEMENT.

This action was instituted by the plaintiff in error, James G. Kidwell, hereinafter called the plaintiff, against the defendant in error, the Oregon Short Line Railroad Company, hereinafter called the defendant, in the Circuit Court of the State of Oregon for the County of Baker for the recovery of \$4,927.00, as damages suffered by the plaintiff by reason of the shipment of 16 carloads of cattle from Baker, Oregon, on December 3, 1909, over the line of railroad of the defendant. On petition of the defendant said cause was removed to the Circuit (now the District) Court of the United States for the District of Oregon. The cause having been put at issue by the pleadings came on for trial on July 7, 1912, before Judge R. S. Bean and a jury; and the plaintiff having introduced his testimony and rested, the defendant filed its motion for a nonsuit, which motion was sustained by the Court and a judgment dismissing said cause granted and entered.

The only assignments of error are the sustaining of said motion for a nonsuit and the granting of said judgment dismissing said cause.

POINTS AND AUTHORITIES.

I.

Where a carrier keeps livestock in its cars for more than twenty-eight consecutive hours, contrary to the

U.S. vs. So. Pac., 157 Fed. 459, 463.

U.S. vs. Kansas City Southern Ry.
Co., 189 Fed. 471, 479.

U.S. vs. Union Pac. 169 Fed. 68.

provisions of the statute, such act constitutes negligence *per se*, and the carrier is liable not only for the penalty prescribed, but also for any damage or injury that may thereby be sustained by the owner of the stock.

Reynolds vs. Great Northern Ry. Co., 40
Wash. 163, 111 Am. St. 883, 891.

Nashville R. Co. vs. Heggie, 86 Ga. 210,
22 Am. St. 453, 455;

Baltimore etc. R. Co. vs. Wood, 130 Ky.
839, 114 S. W. 734;

Cincinnati etc. R. Co. vs. Guering, 30 Ky.
Law Rep. 1180, 100 S. W. 825.

II.

The Carmack Amendment to the Hepburn Act provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: *Provided*, That nothing in this section

shall deprive any holder of such receipt or bill of lading of any remedy or right which he has under existing law.”

1909 Suppl. Fed. Stat. Ann, 273.

III.

The burden of proving the **reasonableness** of a provision of a limited liability contract of affreightment requiring notice of claims for loss or damage as well as plaintiff's failure to comply with the terms of such provision is upon the carrier.

Hutchinson on Carriers (3d ed.), Sec. 447
and cases cited.

Houtz vs. Union Pacific R. Co., 33 Utah,
175, 93 Pac., 439, 447;

Ft. Worth etc. R. Co. vs. Greathouse, 82
Tex. 129; 17 S. W. 834, 838 Sec. 8;

Cox. vs. Vermont Cent. R. Co., 170 Mass.,
129, 49 N. E. 97, 101;

St. Louis etc. R. Co. vs. Hayes, 13 Tex.
Civ. App. 577, 35 S. W. 476 Sec. 2;

Hatch v. Minneapolis etc. R. Co., 15 N.
D. 491, 107 N. W. 1087, 1088;

St. L. & S. F. R. Co. vs. Bryce, 110 S. W.
529.

6 Cyc. p. 507, and cases cited.

5 Am. & Eng. Enc. Law (2d Ed.), p. 325
 Sec. 4, and cases cited.

IV.

Since the purpose of a provision in a limited liability contract requiring notice of loss or damage is to afford the carrier a prompt opportunity to investigate the nature and extent of an alleged injury, such provision will be construed as referring only to claims for injuries *to the stock themselves*, and not to claims for damages arising from a decline in the market or extra feed due to delays by the carrier.

Hutchinson on Carriers (3d Ed.), Sec.
 445.

Klass Commission Co. vs. Wabash R. Co.,
 80 Mo. App. 164, 168;

Kramer vs. Chicago etc. R. Co., 101 Iowa
 178; 70 N. W. 119;

*Pecos & M. T. R. Co. vs. Evans-Snyder-
 Buell Co.*, 100 Tex. 190, 97 S. W. 466;

Estes vs. Denver etc. R. Co., 49 Colo. 378,
 113 Pac. 1005, 1009;

St. Louis etc. R. Co. vs. Hurt, 135 S. W.
 599;

Loeb vs. Wabash R. Co., Mo. 85 S. W.
 118;

Aull vs. Railroad, 116 S. W. 1122.

V.

Notice to last carrier is sufficient.

Ry. Co. vs. Heyser, 95 Ark. 412, 130
S. W. 562.

VI.

The payment of the "regular tariff rate" by a shipper entitles him to transportation of his goods by the carrier without any limitation upon the carrier's liability, notwithstanding any provisions of the contract to the contrary.

Holland vs. Chicago etc. R. Co., 123
S. W. 987;

George vs. Ry. Co., 214 Mo. 551; 113
S. W. 1099; 127 Am. St. 690, 693, 699;

Besheer vs. St. Louis etc. R. Co., 131 S.
W. 767;

Burns vs. Chicago etc. R. Co., 132 S. W. 1.

VII.

A limited liability contract of affreightment must be supported by an independent consideration.

Hutchinson on Carriers (3d Ed.), Sec.
475.

George vs. Ry. Co., 214 Mo. 551; 127 Am.
St. 690, 695.

6 Cyc. p. 395, Sec. e, and cases cited.

5 Am. & Eng. Enc. Law (2d Ed.), p. 298,
subd. 5b and cases cited.

FACTS PROVEN.

The bill of exceptions brings up all of the evidence, from which it will appear that plaintiff herein (Transcript, p. 41), when he billed said cattle at Baker City, Oregon, over the O. R. & N. Co. railroad, stated to the agent that he wanted to ship to South Omaha with a feed in transit rate to some point in Idaho around American Falls or Minidoka, provided there were good feed yards there. After investigation said agent reported to plaintiff that he had no feed in transit rate and advised plaintiff to bill them local to Minidoka, where he said (Tr. p. 42) there were good feed yards. Accordingly these 16 cars of cattle were billed to Minidoka, Idaho. There were 398 head of these cattle. They were all loaded and billed (Tr. p. 42) and ready to leave Baker City at 7:45 o'clock p. m. on December 3, 1909, but the train did not get started until 9:05 o'clock of that day. They arrived in Huntington at 2:30 o'clock the next morning when they were turned over to the Oregon Short Line Railroad Company, the defendant. The line of railroad of the defendant extends from Huntington, Oregon, to Granger, Wyoming, a distance of 541 miles (Tr. pp. 161-164). This shipment of cattle was delayed at Huntington while an engine was brought from Glens Ferry, 267 miles, to pull them (Tr. p. 42). Leaving Huntington, they reached Glens Ferry at 8:00 o'clock p. m.

December 4, after experiencing a great deal of switching and jamming and standing upon side tracks (Tr. p. 43). At Glens Ferry, plaintiff, upon demand of defendant, signed a release allowing the cattle to be run for 36 hours. The rough treatment of these cattle by jamming, switching and standing on side tracks continued until Shoshone was reached at 3:30 a. m. December 5 (Tr. p. 44). Several hours were consumed at Shoshone in endeavoring to determine whether the cattle should be unloaded for rest, feed and water (Tr. pp. 44-47). The plaintiff examined the yards and found that it would require yards four times their size properly to rest, feed and water said 398 head of cattle, and besides there was neither feed nor water that could be had. The plaintiff demanded that the cattle should be run on to Minidoka, their destination. The defendant kept these cattle standing on side track at Shoshone from 3:30 a. m. until 11:00 a. m.

NO STOP AT MINIDOKA.

Finally, after a delay of seven and one-half hours at Shoshone, an engine was put on and the cattle started toward their destination, but they did not stop there (Tr. p. 48). They went right on through Minidoka to American Falls, a distance of 33 miles. The record (Tr. pp. 47-48) disclosed the reason. There were no feed yards at all at Minidoka, and had not been for six or eight months, and they reached American Falls at 4:03 p. m. December 5, where the cattle were unloaded

after having been held without being unloaded for rest, feed or water from 7:05 p. m. of December 3, to 4:03 p. m. of December 5, being 43 hours and 18 minutes, allowing one hour for change from Pacific to Mountain time.

EFFECT OF TREATMENT ON CATTLE.

Plaintiff describes the condition of these cattle when they reached American Falls, as follows (Tr. p. 50): "They were badly bruised and awfully bad shrunk, drawn, awfully drawn up and they was bruised and the hair was rubbed off lots of them; this condition was caused by bad handling and standing along siding along the railroad from Huntington to American Falls; from my experience as a cattle shipper, I would say that standing cattle on siding causes them to get nervous and restless, to fight, and lay down, get down in the car and tromp each other, jamming cattle causes them to get bruised, rubbed, they get down and rub each other, crowd up and skin up all the way along when they are jamming and unloading rough; if cattle go for a long period without food, rest or water, it causes them to get down, if you stand cattle, if you overrun them, if you keep them on cars too long, they were going to get tired, quit, and lay down and fall down and bruise up; they shrink away; they shrink all the time after they begin to bruise; if they get bruised up and sore up they begin to shrink and shrink fast; these cattle were in good condition when they arrived in Huntington, Oregon, all standing and all right."

At American Falls (Tr. p. 51) the plaintiff paid the freight from Baker City to Minidoka according to the billing, no charges being made by the defendant from Minidoka to American Falls, and took possession of the cattle and put them in a good pasture (Tr. p. 49), where there was lots of grass and fed them hay in addition.

PLAINTIFF ABANDONS ORIGINAL INTENTION.

Plaintiff's intention originally (Tr. p. 94) was to hold these cattle on feed in Idaho for the purpose of shipping them on to the eastern market at Omaha whenever the market was inviting; as he puts it "speculating upon the possibility of a better market." However, they were so sore, bruised and drawn when they reached American Falls (Tr. p. 45), that plaintiff decided that he would have to hold them too long, five or six weeks, to get them back on their feed like they were when they started, or like they would have been with good treatment.

SECOND SHIPMENT.

Hence, after a rest of four days near American Falls, plaintiff decided to ship to South Omaha and did ship these cattle to South Omaha (Tr. p. 51), under a new contract and billed at local rate. He left American Falls at 4:40 o'clock p. m. December 9, and after much rough treatment and delays (Tr. p. 54) arrived in Green River at 10:40 p. m. December 10 (Tr. p. 50), making 30 hours

that the stock were confined without rest, food or water.

The run over the Union Pacific from Granger to South Omaha was a great improvement over the treatment received on the Short Line, although these cattle received some rough treatment at several points on the Union Pacific. From 90 per cent to 95 per cent (Tr. p. 95) of the damages to these cattle was caused by the treatment received on the defendant's line.

LOSS IN SHRINKAGE.

These cattle weighed on an average 1,260 pounds each (Tr. p. 41) when loaded at Baker City and weighed 1,083 pounds each (Tr. p. 55) when they arrived at South Omaha, showing a shrinkage of 177 pounds each. The shrinkage between Baker City and American Falls was 140 to 150 pounds per head (Tr. p. 129). The usual, customary and normal shrinkage would be (Tr. pp. 90, 104, and 132) 75 to 80 pounds; hence the excess shrinkage was about 100 pounds per head to Omaha and about 70 pounds to American Falls.

LOSS IN MARKET PRICE.

These cattle sold at Omaha at an average of \$4.27 per hundred but if they had received the usual and customary treatment in transportation, the market price (Tr. p. 56) would have been \$5.00 per hundred.

LOSS ON EXTRA FEED.

The plaintiff stopped at Valley, Nebraska (Tr. p.

53), and fed these cattle for three days, which would not have been necessary (Tr. p. 94) if the cattle had received proper treatment in transportation. Plaintiff paid \$340.00 (Tr. p. 94) for feed at this point.

REGULAR TARIFF RATE.

On arrival at South Omaha plaintiff paid the freight from American Falls to South Omaha at the local rate (Tr. p. 57). After plaintiff returned to Portland the railroad company refunded to plaintiff \$600.00 on account of the freight on these cattle, reducing the charge thereby to what it would have been on a through shipment from Baker City to South Omaha at the *regular tariff rate*.

PLAINTIFF'S LOSS.

Plaintiff's loss, therefore, on account of the treatment received in the transportation of these cattle was: First, 73 cents per hundred on the market price of these cattle; Second, Shrinkage in the weight of these cattle of about 100 pounds per head, aggregating nearly 40,000 pounds; and Third, Extra feed at Valley, Nebraska, costing plaintiff \$340.00.

LIMITATION OF LIABILITY.

The shipment from Baker City to Minidoka was made under a limited liability livestock contract which contained, *inter alia*, the following limitation (Tr. p. 28) :

“9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock, shall have the benefit of any insurance that may have been effected thereupon.”

NO LIMITATION OF LIABILITY ON SECOND SHIPMENT.

On the shipment of these cattle from American Falls to South Omaha it does not appear that there is any limitation upon defendant's liability.

NOTICE OF CLAIM FOR DAMAGES.

Plaintiff testified (Tr. p. 59 et seq.):

“Q. Now, in reference to the claim that you made, if you made any claim there before you arrived at Omaha, or after you arrived there. State what you did in regard to making a claim against the company for damages.

A. Well, at Shoshone, I told the agent there—called Mr. Lonergan and Mr. Trowbridge, both my men with me; Mr. Trowbridge was interested in the cattle—told the agent there that the railroad company would have to—I was going to put in a claim and he notified them to that effect, for side tracking these cattle, and

handling them bad from Huntington until the time I left there. And when I got to American Falls, I told the agent there would be a claim against the company for damages sustained and injury to these cattle. When I got to Laramie City, I told the agent there that two steers jumped out of the cars at Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha; after these cattle or about the day they were sold there, and I paid the billing freight—and talked to the agent there at South Omaha, and told him the same thing. That is the man I talked to. * * *

Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

A. Yes, sir.

Q. What is it? You may state what this is, Mr. Kidwell?

A. It is a statement for claim that I put in against the O. S. L. and Union Pacific railways for injuries and damages sustained to the cattle.

Q. You put that in here in Portland, did you?

A. I did. Yes, sir.

Q. How did you come to put that claim in here at Portland?

A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.

ARGUMENT.

On pages 165-171 of the Transcript will be found the opinion of the lower court in passing upon the motion for a nonsuit in this case, which shows that the only point upon which the lower court considered the evidence insufficient was upon the question of the sufficiency of plaintiff's notice to the defendant of his claim for damages. We do not think that the sufficiency of the evidence upon any other feature of the case can be questioned and for that reason will confine our argument to the notice of claim for damages.

TWO CONTRACTS OF AFFREIGHTMENT.

Unquestionably the evidence shows that plaintiff shipped these cattle from Baker City under a contract which fixed the destination at Minidoka, Idaho. The bill of lading constituting the contract between plaintiff and defendant for this shipment is pleaded and set out *in hac verba* in the answer.

Plaintiff applied to the agent at Baker City for a through billing to South Omaha, that is, *a feed in transit*

rate, a contract which, if it had been granted, would have given plaintiff the right to stop at Minidoka for any length of time within the time limit (6 or 8 months) and reship at any time when he considered the market favorable. Under a feed in transit contract, plaintiff would have paid the local rate from Baker City to Minidoka and a notation (Tr. p. 93) would have been made on his bill of lading at Baker City which would have designated that it was a feed-in-transit contract and when plaintiff reshipped to South Omaha he would have been charged and would have paid the through rate from Baker City to South Omaha, less the local rate from Baker City to the point of reshipment. But, *NONE OF THESE THINGS WERE DONE.*

The agent at Baker City refused to give plaintiff a feed-in-transit rate, but persuaded the plaintiff to bill the cattle local to Minidoka. When the cattle were reshipped from American Falls to South Omaha there was a local billing and plaintiff was charged and paid the local freight rate. The fact that the railroad company *voluntarily* repaid to plaintiff six hundred dollars on account of the freight that he had paid on these cattle cannot change the original contracts of shipment even though this six hundred dollars taken from the freight rate paid by the plaintiff would leave a remainder that would be equal to what the freight rate from Baker City to South Omaha would have been. It was merely an **admission** on the part of the railroads that plaintiff should have received a feed-in-transit rate when he

applied for it at Baker City, but it does not change the fact that he did not get it. It merely emphasizes that fact.

Again, The bill of lading set out in defendant's answer shows that it is neither a through billing to South Omaha, nor a feed-in-transit billing to Minidoka, but merely a local billing with Minidoka as the point of destination; and constitutes the *first contract of affreightment*.

This contract became an executed contract and terminated on the evening of December 5, 1909, at American Falls, Idaho, by the defendant delivering the cattle to the plaintiff and the plaintiff paying the freight and taking the cattle from the possession of the defendant and placing them in a pasture and upon feed. If the cattle had been in as good condition as they would have been if they had received the usual treatment in transportation at the hands of the defendant in their shipment to this point, plaintiff would have kept them there upon feed until such time as the Omaha market appeared favorable, but their condition was such that it would require six weeks' feeding to get them over their soreness and injury and back to the condition in which they should have been when they arrived at American Falls and would have been except for defendant's negligence.

Consequently, at the expiration of four days plaintiff decided to get these cattle to market as soon as possible and shipped from American Falls to South Omaha. This constitutes *the second contract of affreightment*.

NO NOTICE OF CLAIM NECESSARY.

Under the allegations in the pleadings in this case and the facts as testified to by the witnesses it was not necessary for the plaintiff to give any notice whatever upon the arrival of this shipment to South Omaha of his claim for damages by reason of the negligence of the carrier.

An act of the carrier made it impossible for the shipper to give notice of his claim for damages at Minidoka.

We call the Court's attention to the fourth paragraph of the complaint which is a clear allegation that these cattle were first billed to the plaintiff as consignee at Minidoka in Idaho, and that afterwards upon their arrival at American Falls they were billed by the plaintiff to South Omaha. It is true that in this allegation the plaintiff alleges that the eventual destination of these cattle was South Omaha, but it is equally alleged that they arrived at South Omaha under two billings. The fourth allegation of the answer (Transcript, p. 32) alleges that the cattle were billed to Minidoka, Idaho, and the fifth allegation (page 35) that they were afterwards re-loaded and shipped from American Falls to South Omaha.

The only bill-of-lading which was pleaded and the only bill-of-lading which was in any way brought to the attention of the court during the trial of this action is the bill-of-lading set up in the answer of defendant

(transcript, pages 22 to 32). According to this bill-of-lading the cattle were consigned to J. G. Kidwell at Minidoka, which, under such bill-of-lading, was the point of destination. The ninth clause of said bill-of-lading appearing on page 28 of the transcript, is a clause requiring the shipper to put in claim for loss, and this clause says that he shall put in such claim for loss at the point of destination. the point of destination meaning, of course, the point of destination in the particular contract in which said clause appears, which point of destination in this contract was Minidoka, Idaho. Now, the cattle were never stopped at Minidoka, Idaho. On page 47 of the transcript the reason for this appears, and that is that there were no yards at Minidoka in which these cattle could be unloaded, and on page 48 of the transcript it appears that the cattle went right on to American Falls and never stopped at Minidoka at all; on page 51 of the transcript that the plaintiff never paid anything whatever for the transportation of the stock from Minidoka, the point of destination of the first bill-of-lading, to American Falls, which is east of Minidoka.

Now, it is very apaprent that if the railroad company ran this shipment through Minidoka without stopping that the plaintiff was thereby relieved from putting in his claim for loss and damage at Minidoka.

Upon the arrival of the stock at American Falls they were re-billed and consigned to South Omaha. This appears at pages 51 and 58 of the transcript as well as

being set forth in the pleadings, and there is not one line of testimony showing any of the stipulations of this bill-of-lading which was issued at American Falls. The bill-of-lading was not introduced in evidence and no evidence whatever as to its contents was offered or received.

The second and third paragraphs of defendant's further and separate answer and defense set forth rules and regulations affecting and governing the transportation and carriage of livestock governed by the tariff as filed with the Interstate Commerce Commission by the defendant herein. That these tariffs were filed and contained matter as alleged in the answer is denied by the second paragraph of plaintiff's reply to such separate answer and defense. No proof is offered that the defendant had ever filed such tariff, as alleged, with the Interstate Commerce Commission, and no proof was offered that this shipment moved from American Falls to Omaha under any such rules and regulations. The court does not take judicial notice of tariffs filed with the Interstate Commerce Commission or any stipulation in bills-of-lading made a part of that tariff. A party relying thereon must prove the same.

Hartwell Ry. Co. vs. Kydd, 74 S. E. 310.

The trial judge in granting a non-suit seemed to place considerable stress upon the fact that this was one continuous shipment from Baker City to Omaha, arriving at this conclusion because the stock were originally

destined for the Omaha market and from the fact that as appears on page 78 of the transcript the plaintiff received a refund on this shipment as if it had been a through billing. Admitting that it was one continuous shipment there is no contract requiring the giving of any notice except at Minidoka, and the fact that the plaintiff received a refund, as if this had been a through shipment, upon no theory that has occurred to us would extend the stipulations in the bill-of-lading issued at Baker City billing these cattle to Minidoka to require the shipper to comply with this bill-of-lading upon the arrival of the stock at South Omaha.

To reiterate, the plaintiff was relieved from giving notice of loss at Minidoka because the shipment never stopped there. He was not required to give notice at South Omaha under the evidence or the pleadings in this case.

NOTICE OF CLAIM WAS GIVEN.

It will be observed that Paragraph 9 of the bill of lading covering the shipment from Baker City to Minidoka does not require the claim for loss or damage to be in writing, for which reason an oral claim is sufficient and substantial compliance with this provision is all that is required.

Even those courts which hold that such a provision in a bill of lading is valid also hold that it must be *reasonable in order to be valid*. The purpose of such a

provision is to afford the carrier an opportunity to investigate claims for loss or damage to livestock before the evidence of such loss or damage is destroyed by the intermingling of such livestock with other stock. The courts that hold such a provision reasonable do so upon the ground that it prevents the carrier from being harrassed by unfounded claims for loss or delay to stock from being made after the evidence which would disprove such unfounded claim has been destroyed. And likewise enables the carrier to determine the extent of damage to such stock while the stock is in its possession.

If the purpose and only purpose of such a provision is to enable the carrier to make the necessary investigations so as not to be imposed upon by unfounded claims, then any claim or notice given the carrier which would enable such carrier to make such necessary investigation before the stock is intermingled with other stock at the point of destination is sufficient and as a consequence is a substantial compliance with Paragraph 9 of said bill of lading.

Is not plaintiff's notice sufficient for that purpose?

Plaintiff told the agent of the defendant at Shoshone that he was "going to put in a claim for sidetracking these cattle and handling them bad from Huntington until the time he left there" and the agent "notified them to that effect." When these cattle arrived at American Falls plaintiff said to the agent of the defendant at that place "there would be a claim against the company for

damages sustained and injury to these cattle". When plaintiff reached Laramie City, he "told the agent there that two steers jumped out the cars around Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha." At South Omaha, when plaintiff paid the freight upon these cattle, to the agent of the Union Pacific Railway Company, on the day on which they arrived there, he told said agent the same that he had told the other agents along the line, and said agent advised plaintiff to put in his claim at this end of the line, Portland, which he did after his return here.

Plaintiff's language in making his claim to these several agents of the carrier is neither technical nor grammatical, but it no doubt made up in force what it lacked in diction. That these agents understood perfectly what was meant is evidenced by the fact that the agent at Shoshone notified them (the proper officials of defendant) of plaintiff's claim.

Now, if plaintiff's notice to these several agents of the defendant and its connecting carrier was sufficient to enable them to inspect these cattle at the point of destination wherever that may be determined to be, before they were intermingled with other stock, then it is a sufficient compliance with Paragraph 9 of said bill of lading and defendant's motion for a nonsuit should have been denied.

SCOPE OF PARAGRAPH NINE.

Does Paragraph 9 of said bill of lading cover all the elements of damage alleged in the complaint and proven by the evidence?

We think not. There is an item of damages of \$340.00 paid by plaintiff (Tr. p. 94) for feed at Valley, Nebraska, which would not have been necessary if the cattle had been shipped through under proper conditions. The "loss, damage or detention" expressed in said paragraph 9 is evidently restricted to the stock described in the bill of lading, making it read thus: "unless claims for loss, damage or detention (*to said stock*) are presented" etc. The last sentence of said Paragraph 9 augments the force of this construction by providing that

"any carrier liable on account of loss or damage *to any of said stock*, shall have the benefit of any insurance that may have been effected thereupon."

This construction coincides with the opinion of the Missouri Court of Appeals in re *Klass Commission Co. vs. Wabash R. R. Co.*, 80 Mo. App. 164, 168, construing similar language in a bill of lading, as follows: "It is further contended that the trial court erroneously fixed plaintiff's damages on the basis of the market value of the clover seed at Toledo, whereas by the bills of lading it should have been based on such value at Columbia, the point of shipment. Aside from any special agreement, the undoubted rule is that the measure of damages

in such cases is the difference in the market value of the goods at the time and place where they should have been delivered and the market price at such place when they were in fact delivered. The sixth clause in the bill of lading, however, provides 'that the amount of loss or damage accruing to the owner of said goods, in so far as the same shall fall upon this or any connecting carrier shall be computed at the value or cost of said goods at the place and time of shipment, and that the railroad company or carrier paying such loss shall have the full benefit of any insurance that may have been effected upon or on account of said goods.' In our opinion this clause in the said contract was not intended to apply to damages of the nature here sued for. The 'loss' or 'damage' there referred to was meant to cover the *loss* or *damage* done to the goods themselves, and does not cover the owner's damage sustained by reason of a mere failure to carry and deliver the goods within a reasonable time. *The last sentence, providing that the carrier shall be entitled to the benefit of insurance taken, adds force to this construction.*"

"The same answer may be made to the further claim that plaintiff is barred of his action because of his failure to give five days' notice of his claim for 'loss or damage provided in the fifth clause of the bill of lading. Such loss or damages have no reference to what the shipper may have suffered by change in the market during the negligent delay in delivering the goods."

BURDEN OF PROOF.

Where rests the Burden of Proof?

Must plaintiff allege and prove that he has given the notice provided in Paragraph 9 of the bill of lading, or show that the provisions of such paragraph are unreasonable as applied to the particular conditions of this cause? Or, must the defendant allege and prove that the provisions of said Paragraph 9 are reasonable when applied to the circumstances of this case and that plaintiff has failed to comply with the provisions of such paragraph?

To begin with, we will admit that the decisions of our courts are not harmonious on this question. However, the weight of authority places the burden of proof upon the defendant.

In discussing this question Hutchinson on Carriers (3d ed.), Sec. 447, says:

“The weight of authority, however, sustains the view that such a stipulation is more in the nature of a limitation upon the owner’s right to a recovery, and that the *burden of proof is accordingly on the carrier* to show that the limitation is reasonable and that the owner omitted to present the notice in proper form or within the time stated”.

A like opinion is expressed in *Fort Worth and D. C. R. C. vs. Greathouse*, 82 Tex. 104, 17 S. W. 834, 838,

paragraph 8, from which we quote as follows:

“It is insisted by appellant that the court erred in overruling its demurrer to plaintiff’s petition, ‘because it does not appear from the allegations that plaintiff gave notice of his claim for damages to the nearest station agent before the cattle were removed from the place of delivery’. Without determining whether or not this provision in a contract, such as in this case, will in any case be enforced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced, and that recognize their legality. When such provisions of a carrier’s contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show, by proper pleadings and evidence, the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carriers.”

In *Hatch vs. Minneapolis, St. P. & S. S. Ry. Co.*,

15 N. D. 491, 106 N. W. 1087, the Court says:

“The contract of shipment contained the following condition or stipulation: ‘The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stocks, he will give notice in writing of his claim therefor to some officer of said railroad company or its nearest station agent before said stock has been removed from said place of destination, and before said stock has been mingled with other stock.’

“The defendant contends that the complaint must state that the notice of injuries was given before the stock was removed from the place of destination, and before it was mingled with other stock.

* * * The condition or stipulation referred to is not strictly a condition precedent, and it is not part of the cause of action. The cause of action is complete before this condition becomes operative. The cause of action is not created by the contract of the parties. The law controls what facts shall constitute the cause of action. If the law should provide for the notice in the same statute, defining what the

cause of action should be, a different question would be presented. But the condition in this case is made by the contract of the parties and the cause of action is defined by the common law. Hence the condition cannot operate as a part of the cause of action. It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action and pertained to the remedy. It was therefore a matter of defense to be raised by answer, if at all."

The following stipulation was contained in the bill of lading in the case of *Cox vs. Vermont Central Ry. Co.*, 170 Mass. 129, 49 N. E. 97, 101:

"The said company shall not, nor shall any carrier, person, or party aforesaid, be liable in any case or event unless written claim for loss or damage shall be made, to the person or party sought to be made liable, within thirty days' ", etc.

The Court says:

"The defendant relies upon the failure of the plaintiff to comply with the stipulation. The burden is on it, therefore, to

show that the stipulation was a just and reasonable one."

An examination of Paragraph 9 of the bill of lading here involved will disclose that it is not agreed therein that the presentation of the claim for loss or damage shall be a condition precedent to the right of action for such loss or damage; hence, the greater reason for holding that such provision is merely a limitation upon plaintiff's right to recover.

It is evident that the lower court in sustaining the motion for a nonsuit in this case assumed that the burden of proving a compliance with paragraph 9 was upon the plaintiff. This was an erroneous assumption, as the burden was upon the defendant to establish the non-compliance with said provision and the reasonableness thereof. Hence the motion for a nonsuit should have been overruled.

A FORMAL NOTICE WAS PRESENTED.

Finally, we submit that the evidence shows that formal written claim was presented to the defendant in Portland, Oregon. (Tr. pp. 60-61.)

"Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

A. Yes, sir.

"Q. What is it? You may state what this is, Mr. Kidwell.

“A. It is a statement for claim that I put in against the O. S. L. and Union Pacific Railways for injuries and damages sustained to the cattle.

“Q. You put that in here in Portland, did you? A. I did. Yes, sir.

“Q. How did you come to put that claim in here at Portland?

“A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.”

There is no objection made by the defendant in its pleadings to the sufficiency of this formal claim, hence its contents are immaterial.

The answer alleges, Par. VIII (Tr., pp. 34-35), that “plaintiff failed and neglected to give notice to this defendant of his alleged claim for loss and injury to said stock within ten days from the date of unloading of said stock,” etc., but the defendant cannot now be allowed to say that notice was not given within the time limited by the contract when the evidence shows that the agent at South Omaha to whom plaintiff paid the freight told plaintiff to put in his claim here (Portland).

These facts bring the case squarely within the opinion of the Supreme Court of the State of Washington in the case of *Reynolds vs. Great Northern Ry. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 893, where, in passing upon an identical provision in a bill of lading that Court said:

“Appellant also contends that respondent waived any claim for damages by failure to present a claim therefor within ten days from the date of unloading said stock, as provided in the contract. The evidence shows that no written claim was presented until June 2, 1903. The stock was unloaded on May 19, 1903. The contract does not require the claim to be made in writing, or in any specified form. The evidence shows that on the next day after the stock was unloaded respondent talked with the agent at Marian and told him that he wanted to put in a claim for loss, without mentioning any definite amount; that the agent told respondent to see the agent at Kalispell when he paid the freight; that respondent went to the agent at Kalispell to pay the freight and talked with him about the claim for damages, and the agent there directed respondent to see Mr. Jackson at Spokane; that two or three days prior to June 2, 1903, respondent

saw Mr. Jackson, who requested him to write a letter, and that he, Jackson, would thereupon attend to the matter right away. Thereupon on June 2, 1903, respondent wrote the following letter: * * *

“This claim for damages was within time under the contract. On the next day after the cattle were unloaded respondent notified appellant’s agent that he desired to make a claim for damages. Appellant’s agents cannot be permitted to put respondent off from one time to another and finally be heard to say that no claim was made in time; especially when respondent was asking to make a claim within the time limited.”

REGULAR TARIFF.

It has been heretofore shown that plaintiff paid local freight rate from Baker City to Minidoka, Idaho, and when the stock were reshipped from American Falls, Idaho, he paid the local rate from said point to South Omaha, Nebraska. It is likewise shown (Tr. p. 78) that two or three days after plaintiff returned to Portland, Oregon, plaintiff received a refund or rebate from the railroad company on account of the freight on these cattle of something over six hundred dollars. Plaintiff says (Tr. p. 78):

“Just two or three days after I got

here; there was a refund coming, six hundred and some dollars on this shipment on through billing, that is, they gave me the regular—made me pay just the price from Baker City to Omaha—*regular tariff*.”

The lower court seemed to think that this unsolicited (Tr. p. 68) rebate on the part of the railroad company had the effect of welding the two original contracts of affreightment into one and said court consequently held that the bill of lading issued at Baker City for the shipment to Minidoka controlled the relation between the plaintiff and the carriers all the way to South Omaha.

Admitting for the purpose of this argument only, that said refund could have had the effect of welding the two original contracts into one, we submit that the lower court left out of consideration one very important bit of evidence, namely, that this refund left the amount of freight paid by plaintiff **the regular tariff rate**. Plaintiff's words are (Tr. p. 78) “they gave me the regular—made me pay just the price from Baker City to Omaha—regular tariff.”

Now, the “regular tariff rate” is one thing, and a “reduced rate,” necessary to sustain a limited liability contract, is another. The plaintiff paid the regular tariff and there was, therefore, no consideration for the limited liability contract or bill of lading. This sustains the allegation of plaintiff's reply that there was no con-

sideration for the limited liability contract set up in defendant's answer.

This question has arisen a number of times in the State of Missouri in cases in which printed forms of bills of lading were used, reciting, among other things, that the rate charged for transportation was "at the rate of . . . tariff . . . per cwt." The opinion of the Supreme Court of the State of Missouri on motion for a rehearing in *George vs. Chicago etc. Ry. Co.*, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690-693, contains a particularly lucid and logical discussion of the effect of the payment of the tariff rate upon a limited liability contract, from which we quote as follows:

"2. The point on which appellant chiefly relies in support of its motion for a rehearing is that in the contract under which the defendant undertook to transport the plaintiff's hogs it was expressly stipulated that in case of loss or injury to the stock the plaintiff should give defendant notice thereof in writing, the notice to be served within one day after the delivery of the stock at destination, and a failure to give such notice would bar a recovery of any claim on account of such loss or injury; and that there was no such notice given in this case. * * *

"We understand the proposition of the

counsel now to be that no consideration is necessary to support such a contract; in other words, the railroad company may charge the full tariff rate and yet limit its common-law liability in the manner now claimed. If there is a decision in this state going to that extent, the learned counsel have not brought it to our attention.

“The railroad company in making this contract did not proceed on the theory that it had the right to charge full tariff rate and at the same time limit its liability, but, on the contrary, the contract read in evidence expressly says that the shipper has agreed to it in consideration of the reduced rate. It seems to have been a printed form, and therefore presumably the one in common use. If the railroad company had been advised that it could limit its liability in this respect without any concession on its part, it is not likely it would furnish printed forms like this to its station agents. Railroad companies are generally well advised as to their legal rights.

“There can be no such thing as a contract without a consideration to support it. Our law primer told us that. If, therefore, the railroad company cannot obtain

this limitation on its liability, or this particular right which it now pleads in bar of the plaintiff's claim, otherwise than by contract, then it must give something to support the contract. If it is a concession that requires the shipper's consent before it becomes binding on him, then it is not binding, even though he does consent, unless he is paid for it. If, on the other hand, it is a condition that the railroad company may impose without the shipper's consent, then the law of contract has nothing to do with it; the railroad company may simply adopt it as a regulation and the shipper is bound to accept it. If it is to be classed under the head of a reasonable regulation which the railroad company may impose without the consent of the shipper, then the railroad company may refuse to receive the shipper's livestock for transportation on any other terms, though full tariff rate be tendered. No case has hitherto fallen under our notice in which a railroad company has claimed such a power.

“The right on which the defendant is here insisting is either a right it has independent of contract or one it has obtained by contract; if the former, the shipper's consent is of no consequence; if the latter,

his consent is of consequence only when there is a consideration to support it.

* * * * *

“The contract which defendant produced in evidence in this case recited that the price charged for the transportation was ‘at the rate of . . . tariff . . . per cwt.’ A shipping contract in exactly the same words in this respect was construed by this court in *Kellerman vs. Kansas City etc. R. R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828, to mean that the price charged was the full tariff rate.

* * * The highest rate that this defendant could have charged the plaintiffs for that shipment was the tariff rate, and that rate covered all that the carrier could demand for the performance of all its common-law or statute duty in respect of that shipment. Therefore, when the contract shows that that was the rate charged, it was vain to recite therein that it was ‘less than the rate charged for shipments transported at carrier’s risk’. The plaintiff is not here contending that the carrier assumed anything more in the way of a risk than that embraced in the duty which the law imposes upon a railroad company in

Wood vs. Southern Ry. Co.,
24 S.E. 704, 705.

the transportation of livestock carried at the regular tariff rate. * * *

“Those are the only decisions of this court bearing on this question to which our attention has been drawn, and from them we see that in every case where the contract relied on by the railroad company was not supported by a consideration in the way of a reduced rate it was held to be void, and the cases in which the contracts were sustained were those wherein their validity was questioned only on the ground that it was against public policy or that the stipulations were unreasonable or that the facts of the case excused the literal compliance with the terms.”

The authorities are particularly unanimous that the shipper must be given *a reduced rate—one lower than the regular tariff*—in order to bind him by the terms of a limited liability contract. *The regular tariff rate is where there is no limitation upon the liability of the carrier and where the regular tariff is charged, there can be no limitation upon the carrier's liability.*

It follows, therefore, that if there was but one shipment, one contract of affreightment upon which the regular tariff rate was charged, the limitations upon the carriers' liability contained in said bill of lading including said paragraph 9 are without consideration and void,

and the plaintiff was under no obligation to serve his claim for damages upon the defendant. The lower court, therefore, erred in sustaining the motion for non-suit.

SUMMARY.

We would summarize the argument of this brief into the following reasons why the judgment of the lower court should be reversed:

1. The first shipment was from Baker City, Oregon, to Minidoka, Idaho, and was made under the Limited Liability Livestock Contract or bill of lading set out in defendant's answer. Since the train bearing this shipment made no stop at Minidoka but went right through this station without stopping, the provision of said bill of lading requiring claims for loss, damage or detention to be presented at destination was unreasonable, and could not be insisted upon by the defendant, it having carried the stock beyond the point of destination, and that not at plaintiff's request, and consequently no notice was required, and the motion for non-suit should have been overruled.

2. Plaintiff notified the agents of the defendant at both Shoshone and American Falls of his intention to claim damages for the treatment this shipment had received and the agent at Shoshone notified the company of such claim. This was a substantial compliance with the requirement of the bill of lading and the motion for a non-suit should have been overruled.

3. The second shipment was from American Falls, Idaho, to South Omaha, Nebraska. The nature of this contract of affreightment is not disclosed, except that the cattle were billed at the local rate from American Falls to South Omaha. Hence, there was no limited liability contract covering this shipment and consequently no notice of claim for loss or damage could be exacted from plaintiff, and the motion for a non-suit should have been overruled.

4. When these cattle arrived at South Omaha, the plaintiff notified the agent of the Union Pacific to whom he paid the freight of his claim for damages on these cattle and was told to file his claim at this end of the line (Portland), which he did after his return to Portland. This was a compliance with the provisions of the Limited Liability Contract set up in the answer and the motion for non-suit should have been overruled.

5. The provision of the said bill of lading requiring claims for loss, damage and detention to be presented within ten days, etc., is a limitation upon plaintiff's right of action and not a condition precedent thereto, hence the burden of proving the reasonableness of such provision when applied to all the circumstances of this case as well as the burden of proving plaintiff's failure to comply therewith was upon the defendant, and the motion for a non-suit should have been overruled.

6. The item of \$340 expended by plaintiff for feed at Valley, Nebraska, is not included in the "loss, dam-

age or detention" to said stock contemplated by said provisions of the bill of lading; therefore, no notice was required as to this item of damage, and the motion for non-suit should have been overruled.

7. Under the adjustment of the rate on these cattle voluntarily made by the carriers after plaintiff had returned to Portland, by the return to him of over \$600.00 of the freight which he had paid them, he was charged the "regular tariff" through rate from Baker City to South Omaha. This being true, there was no consideration for the limited liability contract and the provisions requiring notice of claim of loss or damage was void, and said motion for a non-suit should have been overruled.

We submit, therefore, that the writ of error in this cause should be sustained, this cause reversed, the judgment of non-suit set aside and a new trial ordered.

Respectfully submitted,

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In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES G. KIDWELL,
Plaintiff in Error.

v.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,
Defendant in Error.

Brief of Defendant in Error

STATEMENT OF CASE.

This was an action originally commenced in the Circuit Court of the State of Oregon for the County of Baker to recover the sum of \$4927 on account of the alleged improper handling by defendant of a shipment of 398 head of cattle moving from Baker City, Oregon, to South Omaha, Nebraska, during the month of December, 1909. It is alleged in paragraph IV of the complaint that said shipment was shipped from Baker City, Oregon, to Minidoka, Idaho, it

being the intention of plaintiff as known to said defendant to continue the transportation of said cattle from Minidoka to South Omaha.

Plaintiff in error claims that by reason of the alleged improper handling of said shipment in transit said cattle sustained a shrink of seventy-two pounds per head more than the normal shrink, and that by reason of such improper handling by the defendant in error, the plaintiff in error was required to furnish said stock in transit with extra feed in the sum of three hundred dollars.

As a defense to said complaint defendant admitted that said shipment consisting of sixteen carloads was received by The Oregon Railroad & Navigation Company at Baker, Oregon, on or about the fourth day of December, 1909, and thereafter turned over to the defendant herein. Defendant further alleged that said shipment moved under and pursuant to the terms and conditions of the current livestock contract, a copy of which is set out in defendant's answer; that among other things defendant's tariff contained a provision to the effect that carriers do not undertake to carry livestock to arrive at any particular point on any particular market day or market hour, and that the rates named in the tariff were subject to the terms and provisions of the current livestock contract; that in said current livestock contract it is provided, among other things, no carrier shall be liable for any loss or damage to stock by causes beyond its control, shrinkage in weight, or any other

causes not directly the result of negligence on the part of the carrier; that the shipper expressly agrees to load and unload and care for said stock in transit; that plaintiff at the time he executed said stock contract agreed that "unless claims for loss, damage or detention are presented within ten days from the date of unloading of said stock at destination and before said stock has been mingled with other stock, such claim shall be deemed to be waived and the carriers and each thereof shall be discharged from liability."

It was further alleged that said cattle were wild and unruly and in poor shipping condition, that same were transported without unnecessary delay from Baker, Oregon, to Minidoka, Idaho, and there tendered to the plaintiff, but owing to the fact that a violent and unusual storm was raging and the further fact that it was almost impossible for plaintiff to purchase feed at Minidoka he refused to unload same at that point, and thereafter and at his request said cattle were transported to American Falls, at which place they were unloaded for feed, water and rest. After remaining at American Falls about ninety-six hours plaintiff reloaded said stock and shipped them to South Omaha, Nebraska, their ultimate destination.

It was further alleged that defendant and its connecting carriers had in full force and effect at and prior to the time said shipment moved a tariff of rates applying on livestock providing that a lower rate would be given to shippers who executed the livestock

contract and that plaintiff in this case secured the benefit of such lower rate; that upon arrival of such shipment at South Omaha they were in the same order and condition they were in when received by the Oregon Railroad & Navigation Company at Baker, except for the usual depreciation which all livestock in transit are liable to and depreciation due to the poor shipping condition, and the further fact that plaintiff and his agents while in charge of said shipment failed to give same proper and necessary attention; that plaintiff failed and neglected to give notice to this defendant of his alleged claim at destination as required by the livestock contract, and therefore whatever, if any, claim he may have had against defendant was barred by reason of his failure to comply with his contract.

As a reply plaintiff admitted execution of the livestock contract, movement of the cattle from Baker to American Falls, reloading of same at that place and final delivery at destination; alleged that said livestock contract was void for the reason that it was in violation and contravention of Section 7 of the Act of Congress known as the Carmack Amendment, 34 Stat., 595.

Said case was removed by defendant in error from the Circuit Court of the State of Oregon for Baker County to the Circuit Court of the United States for the District of Oregon, and thereafter and on July 7, 1912, said case was tried by a jury before Honorable R. S. Bean, and at the conclusion of plaintiff's testimony defendant interposed a motion for non-suit,

which motion was sustained by the court, and by reason thereof plaintiff in error is prosecuting this appeal.

POINTS AND AUTHORITIES.

I.

The evidence shows that whatever, if any, delay or shrinkage above the normal shrink the shipment may have sustained was caused by circumstances and conditions over which this defendant had no control and for which a carrier is never held liable as a matter of law.

Gulf Etc. Ry. v. Thomas, 138 S. W., 819-821.

M. K. & T. Ry. Co. v. Garrett, 87 S. W., 172.

Needham v. Boston Etc. Ry. Co., 74 Atl., 226.

St. Louis Etc. Ry. Co. v. Moon, 103 S. W., 1176.

St. Louis Etc. Ry. Co. v. Smith, 77 S. W., 28.

Tiller v. Chicago Etc. Ry. Co., 120 S. W., 672-675.

M. K. & T. Ry. Co. v. Rogers, 118 S. W., 738.

II.

The plaintiff in error cannot recover for alleged extra feed bill at Valley, Nebraska, for the reason that his witnesses testified that it was the custom to stop and feed cattle at this point in order to fill them up and rest them for the Omaha market. In any event, the defendant was in no wise connected with the delay at Valley.

Transcript of Record, pages 53, 69, 98, 99, 129.

III.

There is no evidence showing or tending to show that plaintiff's stock was injured through the negligence of this defendant while in transit, and for this reason a verdict for the plaintiff would be founded upon mere conjecture and speculation.

Goodman v. O. R. & N. Co., 22 Or., 14-28.

Manning v. Portland S. S. Co., 52 Or., 101.

Reidhead v. Skagit County, 33 Wash., 174-179.

Whitehouse v. Bryant Lumber Co., 50 Wash.,
563-566.

M. K. & T. Ry. Co. v. Garrett, 87 S. W., 172.

Patton v. Texas & Pacific Ry., 179 U. S., 658-
663.

IV.

Plaintiff failed to prove that he gave notice to the defendant of his alleged claim within ten days of unloading the stock at destination and before the stock had been intermingled with other stock as required by the contract of shipment.

M. K. & T. Ry. Co. v. Texas Etc. Ry., 33 Sup.
Ct. Rep., 397-401.

M. K. & T. Ry. Co. v. Hancock, 109 Pac., 223.

Frank L. Smith Meat Co. v. O. R. & N. Co.,
59 Or., 206.

Austin Stephensen Co. v. Southern Ry., 65 S.
E., 757-758.

Parrill et al v. Cleveland Etc. Ry., 55 N. E., 1026.

Atchison Etc. Ry. Co. v. Crittenden, 46 Pac., 1000-1001.

Metropolitan Trust Co. v. Toledo Etc. Ry. Co., 107 Fed., 628, 632.

Smith v. Chicago Etc. Ry., 87 S. W., 9, 10.

Houston Etc. Ry. Co. v. Mayes., 97 S. W., 318, 320.

St. Louis Etc. Ry. v. Pierce et al, 101 S. W., 760, 761.

Wichita Etc. Ry. v. Koch, 28 Pac., 1013, 1014.

Wood v. Southern Ry., 24 S. E., 704, 705.

Southern Ry. v. Adams, 42 S. E., 35, 36.

V.

It is not necessary that there be an independent consideration apart from that expressed in the shipping contract to support a stipulation of agreed valuation. The presumption is that sufficient consideration was given for the limitation, and unless plaintiff proves absence of consideration by clear and satisfactory proof the presumption of consideration will prevail.

Cau v. Texas & Pacific Ry., 194 U. S., 427, 432.

Arthur v. Texas & Pacific Ry., 139 Fed., 127, 130.

Schaller v. Chicago Etc. Ry., 71 N. W., 1042, 1044.

Miers v. Ry Co., 114 S. W., 1052.

Skelton et al v. Ry. Co., 110 S. W., 627.

Schroeder v. Turpin, 122 S. W., 1, 2.

VI.

Congress has manifested the purpose to take possession of the subject of transportation of property and liability of carriers by railroad of interstate shipments, and such laws and regulations supersede all state regulations or laws on the same subject, and the rule of law is now definitely and conclusively settled by the United States Supreme Court that agreed valuations and contracts limiting the carriers' common law liability will be upheld and enforced.

Adams Express Co. v. Croninger, 33 Sup. Ct. Rep., 148.

C. B. & Q. Ry. Co. v. Miller, 33 Sup. Ct. Rep., 155.

C. St. P. M. & O. Ry. Co. v. Latta, 33 Sup. Ct. Rep., 155.

Wells Fargo Co. v. Nieman Marcus Co., 33 Sup. Ct. Rep., 267.

Kansas City Southern Ry. v. Carl, 33 Sup. Ct. Rep., 391.

M. K. & T. Ry. Co. v. Harriman Bros., 33 Sup. Ct. Rep., 391.

ARGUMENT.

I.

THE EVIDENCE SHOWS THAT WHATEVER, IF ANY, DELAY OR SHRINKAGE ABOVE THE NORMAL SHRINK THE SHIPMENT MAY HAVE SUSTAINED WAS CAUSED BY CIRCUMSTANCES AND CONDITIONS OVER WHICH THIS DEFENDANT HAD NO CONTROL AND FOR WHICH A CARRIER IS NEVER HELD LIABLE AS A MATTER OF LAW.

The court will note by referring to page 164 of the Transcript of Record that the above was defendant's first ground on motion for non-suit.

In this connection we desire to call the court's attention to the fact that plaintiff testified, among other things, that while this shipment was in transit it was necessary for the stock train to be sidetracked at several different points owing to the fact that there had been a washout on the Southern Pacific between Reno and Sacramento and that by reason thereof all of the Southern Pacific passenger trains from the East to California points were being detoured over the lines of the defendant herein. (Transcript of Record, pages 44, 54, 70, 71, 87.) Of course, it goes without saying that a stock train could not expect to have the right of way over a passenger and mail train, nor could anyone contend that the defendant in this case was responsible for the violent and unusual storm causing washouts on the Southern Paci-

fic, thereby making it necessary to detour their passenger trains over this defendant's line of railroad.

The court will also note plaintiff testified that owing to the fact that during the month of December, 1909, a coal famine existed in the vicinity of Chicago; it was therefore necessary for the railroad companies to do everything they possibly could to transport cars of coal from Kemmerer and other coal mines to the East. Plaintiff's testimony shows that he was familiar with this condition and knew that the railroad companies were doing all they could to move these cars from Kemmerer to Chicago and vicinity. (Transcript of Record, pages 54, 70, 124.) Under these circumstances the defendant was required under the law and as an act of humanity to pick up coal cars at Kemmerer and move them in the first available eastbound freight train.

In this connection we would also call the court's attention to the fact that this shipment moved during the month of December, that considerable snow and ice and cold weather was encountered on the trip, and that, as stated by one of plaintiff's witnesses, we ran into an awful blizzard at Rawlins. (Transcript of Record, page 57.)

It is admitted by plaintiff's complaint and his testimony in this case that all cattle while being transported long distances by rail are bound to shrink and decrease in weight and value even though they are given the very best of care and attention, but plaintiff undertakes in this case to show that his stock on this journey suffered an abnormal shrink due to

the fact, among other things, that it was necessary to sidetrack the train upon which his stock was being carried. As a matter of fact, the evidence shows that plaintiff intended to ship his stock to Minidoka, Idaho, at which point he intended to feed them up for the Omaha market, but upon arriving at that place no pasturage of any consequence was available and hay was very scarce and expensive, and by reason thereof he moved the stock to South Omaha without fattening them up at this point for the Omaha market. After leaving Minidoka and American Falls, the shipment, as stated by plaintiff's witnesses, encountered a blizzard at Rawlins, Wyoming.

Taking all these facts into consideration, it seems clear to us that plaintiff's cattle would necessarily shrink to a greater extent than they would had they been moving in the middle of the summertime when grass and hay were plentiful and no snow, ice or blizzard would be encountered, and it would not be necessary to sidetrack stock trains on account of washouts on the Reno division, making it necessary to detour passenger trains over this defendant's line of railroad. Therefore, under this point we maintain that even assuming that plaintiff had shown that his stock had suffered an abnormal shrink, under such circumstances this defendant could not be held liable for same for the reason that it was caused, if at all, by facts and circumstances over which this defendant had no control.

We do not deem it necessary to discuss at length any of the decisions on this point, since it is elemen-

tary that a carrier is never held liable for injury caused by facts and circumstances over which it has no control. However, in this connection we call the court's attention to the fact that we have cited a number of cases sustaining our contention in this regard under Points and Authorities, number I, and therefore maintain that our first point in our motion for non-suit is well taken.

II.

PLAINTIFF CANNOT RECOVER FOR ALLEGED EXTRA FEED BILL AT VALLEY, NEBRASKA, FOR THE REASON THAT HIS WITNESSES TESTIFIED IT WAS THE CUSTOM TO STOP AND FEED CATTLE AT THIS POINT IN ORDER TO FILL THEM UP AND REST THEM FOR THE OMAHA MARKET. IN ANY EVENT DEFENDANT WAS IN NO WISE CONNECTED WITH THE DELAY AT VALLEY.

The court will note by referring to page 164 of the Transcript of Record that the above was defendant's second ground on motion for non-suit.

Plaintiff on cross examination (Transcript of Record, page 98) stated that Valley is about thirty miles from South Omaha, which, as the court will recall, was the ultimate destination of this shipment. He further testified that he held the cattle at Valley from ten A. M. on December 16th until six P. M. on December 19th, and then ran from there to South

Omaha. (Transcript of Record, pages 53, 56, 69); that he stopped the shipment at Valley for the purpose of feeding them up and getting them in better condition for placing on the Omaha market; that in the meantime plaintiff himself had gone to South Omaha to watch the market, and it was a mere matter of speculation how long he was going to leave the stock at Valley (Transcript of Record, pages 98, 98); that they were well fed up and in good condition after they were fed at Valley, and were put upon the Omaha market and looked pretty good; that the stopping of cattle at Valley to fill them up and get them into good condition for South Omaha market was a common practice among stock shippers (Transcript of Record, page 129).

Plaintiff alleges in paragraph VII of his complaint shown on page 7 of the Transcript of Record, that while said cattle were enroute he was compelled to pay for the maintenance of said cattle \$300 more than he would have been compelled to pay if the defendant had permitted them to be fed and cared for at proper times and places. In attempting to sustain this allegation plaintiff testified on page 98 of the Transcript of Record that while he was filling up the stock and resting them at Valley to get them in good condition to place on the South Omaha market he paid out the sum of \$300 for feed. As above stated, his testimony shows that this is the common practice and that he voluntarily held the cattle at Valley while he was at South Omaha watching the market, and finally, after the cattle had been sufficiently rested

and filled and the market at South Omaha had reached a point which was satisfactory to the plaintiff he then moved the cattle on to South Omaha and disposed of them.

We cannot conceive upon what theory of law or justice the plaintiff is entitled to recover any portion of this feed bill from the defendant when the testimony shows that he voluntarily incurred this bill at Valley for the express purpose of getting the stock in condition for sale on the Omaha market.

III.

CONGRESS HAS MANIFESTED THE PURPOSE TO TAKE POSSESSION OF THE SUBJECT OF TRANSPORTATION OF PROPERTY AND LIABILITY OF CARRIERS BY RAILROAD OF INTERSTATE SHIPMENTS, AND SUCH LAWS AND REGULATIONS SUPERSEDE ALL STATE REGULATIONS OR LAWS ON THE SAME SUBJECT, AND THE RULE OF LAW IS NOW DEFINITELY AND CONCLUSIVELY SETTLED BY THE UNITED STATES SUPREME COURT THAT AGREED VALUATIONS AND CONTRACTS LIMITING THE CARRIERS' COMMON LAW LIABILITY WILL BE UPHELD AND ENFORCED.

Plaintiff alleged in paragraph IX of his reply, as shown on page 38 of the Transcript of Record, that the limited liability livestock contract which is admitted was executed and governed the shipment in

question, was void as being in violation and contravention of Section 7 of the Act of Congress as amended commonly known as the Carmack Amendment, 34 Stat. at Large, 595 (now Section 20 of the act to regulate commerce). While this point was not particularly raised at the trial, plaintiff has again seen fit to make the same contention in paragraph II of his Points and Authorities as is shown on page 5 of plaintiff's brief. For these reasons we deem it necessary at this time to briefly refer to this point.

This is not a new question but has been decided many times by the courts. The leading case on the question is *Hart v. Pennsylvania Railroad Company*, 112 U. S., 331, 340, 341, in which it appears that Mr. Hart shipped five horses under a bill of lading which stated the horses were to be transported, among other things, upon the condition that the carrier assumed liability on the stock to the extent of one hundred dollars for each horse. One of the horses was killed and others were injured in transit, and during the trial it appeared that the animals were race horses and plaintiff offered to show damages based on their value amounting to over \$25,000. The testimony was excluded and plaintiff recovered a verdict for the sum of \$1200. On appeal it was

HELD: "Limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond to that value for negligence. The compensation for carriage is based on

the value. The shipper is estopped from saying that the value is greater. * * * There is no violation of a public policy. On the contrary it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus conflict with public policy if the shipper should be allowed to reap the benefit of the contract if there is no loss and to repudiate it in case of loss."

Normile v. O. R. & N. Co., 41 Or., 177, 188, was an action to recover the value of a mule which with other stock defendant agreed to transport from Portland, Oregon, to Astoria, Oregon. Upon arrival of the animals at Astoria, it is alleged that defendant negligently tied the mule to a small red plow; the mule, by moving its head, also moved the plow, became frightened, ran away and was injured. As a defense the defendant alleged that the animal was transported under a contract providing that the value of the stock did not exceed one hundred dollars per head, and that the recovery, if any, should not exceed that sum. Plaintiff obtained judgment for \$150, and in reversing the case on appeal it was

HELD: "It is in effect a representation that the horses and mules were not worth to exceed one hundred dollars per head and an express assent to the rate fixed as a proper charge for transportation based upon such valuation. The plaintiff cannot consistently claim a higher valuation upon the agreed rate of freight, and the contract is not in any proper sense one for the exemption of the defendant from the con-

sequences of negligence. In such a case the shipper is estopped to deny the value which he himself has deliberately fixed and agreed to as the real value of the property when it comes to a loss. Such stipulations in contracts are supported and upheld upon consideration of fairness as it relates both to the shipper and carrier. We are led to this conclusion by cases of palpable analogy and high authority."

Adams Express Co. v. Croninger, 33 Sup. Ct. Rep. 148, was an action to recover the full market value of a small package containing a diamond ring which was lost by the express company. The defendant alleged in its answer that it was engaged in interstate commerce and was subject to the Act to Regulate Commerce, that its rates were based on the declared value of the article transported, that plaintiff elected to have the package transported under its limited liability contract and could not recover in excess of the declared value. Plaintiff demurred to the answer as not containing a defense, and the demurrer was sustained. In reversing the case on appeal the United States Supreme Court

HELD: "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary (citing a number of cases). The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act

of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk, involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

“It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. (Citing a large number of cases.) * * *

“The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. * * *

“We therefore reach the conclusions that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.” The demurrer was therefore overruled and the case reversed.

Chicago, St. Paul & Minneapolis Ry. Co. v. Latta,

33 Sup. Ct. Rep., 155, was a very similar case, and the court reached the same conclusion in reversing and remanding this case for a new trial.

C. B. & Q. Ry. Co. v. Miller, 33 Sup. Ct. Rep., 155. In this case the United States Supreme Court adopted the same rule as laid down in the Croninger case and reversed the case upon the same grounds.

Kansas City Southern Ry. Co. v. Carl, 33 Sup. Ct. Rep., 391. This was a case involving the validity of the release of \$5.00 per hundredweight on a shipment of household goods. The United States Supreme Court upheld the right of the carrier to enter into such contracts, and expressly holds that there is nothing in the Carmack Amendment forbidding such contracts, and again reaffirms the rule laid down in the Croninger case.

M. K. & T. Ry. Co. v. Harriman Brothers, 33 Sup. Ct. Rep., 397. This was an action to recover damages for the alleged negligent killing of a shipment of cattle by derailment of one of the defendant's trains. The shipment moved under the terms and provisions of a livestock contract very similar to the one in controversy in the case at bar. The lower court permitted a recovery for the full value of the shipment notwithstanding the limitations contained in the contract. In reversing the case it was

HELD, in effect, that there was nothing in the Interstate Commerce Act which prevented the carrier from entering into such a contract; *that the reasonableness of its provisions could not be attacked*

in any court; that the Interstate Commerce Commission was the only body which had authority to pass upon the reasonableness of the same. The limitations in the contract were sustained and the same rule adopted as laid down in the Croninger case.

Previous to the above decisions there has been more or less conflict in the different state decisions concerning the right of a carrier to enter into these contracts, but such conflict was more apparent than real, and due to the fact that the different courts failed to note the distinction between a strict limitation for liability for negligence and the agreed valuation in case of loss. But these recent decisions by the United States Supreme Court have removed all of this difficulty and settled beyond any controversy that the carrier has a right to enter into such contracts and that same will be upheld and enforced.

However, there is still another reason why the Carmack Amendment can have no application to this shipment, and that is that Section 7 of the Act of Congress as amended, 34 Statutes at Large, page 595 (now Section 20 of Act to Regulate Commerce), is only applicable to the initial carrier and plainly states that no rule, receipt or regulation shall change the liability *hereby* imposed. An examination of the language of the act will show that the only liability *hereby* imposed is, that the initial carrier upon receipt of goods shall be responsible through to destination regardless of whether or not the loss occurred upon its or its connecting carrier's line. It is perfectly clear, therefore, that under the recent decisions

of the United States Supreme Court there is nothing in the Carmack Amendment in any wise affecting the right of the common carrier to enter into limited liability livestock contracts.

IV.

PLAINTIFF FAILED TO PROVE THAT HE GAVE NOTICE TO THE DEFENDANT OF HIS ALLEGED CLAIM WITHIN TEN DAYS OF UNLOADING THE STOCK AT DESTINATION AND BEFORE THE STOCK HAD BEEN INTERMINGLED WITH OTHER STOCK, AS REQUIRED BY THE CONTRACT OF SHIPMENT.

By referring to Section 9 of the livestock contract, as shown on page 28 of the Transcript of Record, the court will note that it provides as follows:

“9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. * * *”

By referring to page 165 et seq. of the Transcript of Record, it will be seen that Judge Bean, in granting defendant's motion for a non-suit, discussed this feature of the case at length, and arrived at the conclusion that the non-suit should be granted for the reason that plaintiff did not comply with this section of the contract.

Plaintiff contended upon the argument for a non-

suit, and is now attempting to claim in his brief, that he complied with this section and gave notice of his claim at destination, as required by Section 9 of the livestock contract. The testimony in regard to plaintiff's compliance with Section 9 is contained on page 59 of the Transcript of Record, where he states in effect that he told the agent at Shoshone that *he was going to put in a claim*, and other similar remarks made to different railroad employes between Shoshone and South Omaha, and later on, on page 60, plaintiff testified that he put in a claim in Portland, Oregon.

Plaintiff, on page 33 of his brief, seeks to justify the right of plaintiff to put in a claim to the Oregon Railroad & Navigation Company, at Portland, Oregon, for the alleged reason, as he claims, that some agent at South Omaha told him to take it up with the claim department, as shown on page 61 of the Transcript of Record. As was stated by Judge Bean, in passing on this point, there was no testimony or contention that the plaintiff complied with Section 9 of the livestock contract by making claim at South Omaha within ten days after the arrival of the stock, before they had been intermingled with other stock, and the fact that some agent or employe of the defendant, while the shipment was in transit, was notified that the plaintiff was going to put in a claim, or the fact that somebody's agent—whether Union Pacific agent, agent of the Stock Yards Company, or agent of the commission firm, the evidence does not show—told the plaintiff to take up the matter with the claim

department, without designating any particular claim department, certainly does not authorize a waiver of Section 9 and justify the plaintiff in waiting until the stock had been intermingled with other stock and then several weeks afterwards put in a claim 2000 miles from destination, with the Oregon Railroad & Navigation Company at Portland, Oregon. As a matter of fair dealing and justice between man and man, the defendant is entitled to a reasonable notification of a claim for loss and damage in a case of this kind, whether it is so specified in the livestock contract or not, for the reason that it is absolutely impossible for a railroad company to check up and determine whether or not plaintiff has actually sustained any damage after the shipment has arrived at destination and is sold and butchered. The courts have recognized the justice and reasonableness of such a provision in livestock contracts and have uniformly held that unless the plaintiff complies with such requirements he cannot recover. We desire to refer briefly to a few of the many cases on this subject.

Smith Meat Co. v. O. R. & N. Co., 59 Or., 206, 209. This was a case in which the plaintiff was seeking to recover damages on a shipment of cattle moving from North Powder, Oregon, to Portland, Oregon. The contract governing this shipment contained identically the same clause in regard to the presentation of claims as is contained in the contract in the case at bar. In upholding the validity of this clause the court, among other things,

HELD: "The stipulation that a claim of injury shall be presented within ten days and before the stock shipped shall have been mingled with other stock, is a reasonable stipulation on its very face. Transportation companies can only do business through employes, and the location of these, as well as the time of their employment, is subject to change. It is only fair that in cases of this character the corporation should be seasonably notified that a claim for damages would be insisted upon, in order that a careful inspection of the animals and timely inquiry into the conditions attending their transportation may be investigated and the actual facts ascertained. This is not a stipulation exempting the carrier from liability for negligence, but one giving it an opportunity to ascertain whether its servants have been in fact negligent."

M. K. & T. Ry. Co. v. Harriman Brothers, 33 Sup. Ct. Rep., 397. This case involved a shipment of cattle which moved under the terms and provisions of a limited liability livestock contract, which contained a provision, among other things, to the effect that no suit shall be brought after a lapse of ninety days from the happening of any loss or damage, any statute of limitation to the contrary notwithstanding. The lower court held that this stipulation was void and a verdict was returned in favor of the plaintiff. In reversing the case the court, among other things,

HELD: "The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence

from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. * * * Such limitations in bills of lading are very customary and have been upheld in a multitude of cases (citing cases). * * * The provision requiring suit to be brought within ninety days is not unreasonable and the case is therefore reversed.”

M. K. & T. Ry. Co. v. Hancock & Goodbar, 109 Pacific, 223. This was an action to recover damages for injuries alleged to have been sustained by plaintiff while shipping two carloads of cattle. Shipment moved under a limited liability livestock contract, which contained, among other things, the following stipulation: “That as a condition precedent to the shipper’s right to recover any damages for any loss or injury to the livestock shipped, resulting from the carrier’s negligence, including delays, the shipper shall, within thirty days after the happening of the injuries complained of, file with the freight or station agent of the carrier his claim for damages, giving the amount thereof, and that no suit shall be brought against the carrier after a lapse of ninety days from the happening of the injury.”

HELD: “The stipulation is reasonable and valid and is not against public policy. The court adopts and follows the opinion in the case of *Southern Express Co. v. Caldwell*, 21 Wall. 264.”

Austin-Stephenson Co. v. Southern Ry. Co., 65 S. E., 757, 758, discussing the legality of a clause in a livestock contract, which read as follows:

“That as a condition precedent to any right to recover any damages for loss or injury to said livestock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said livestock, wherever such delivery may be made, and such notice shall be so given before said livestock is removed or intermingled with other livestock.”

HELD: “The carrier does a large business, covering a vast extent of territory, and to allow suits to be brought against it without such notice, at any length of time, when the evidence of the true nature of the transaction has been lost or obliterated and there is no sufficient opportunity afforded of ascertaining the truth of the matter, would be to surrender the carrier, bound hand and foot and in a helpless condition, to the tender mercies of the shipper, and subject it to the payment of almost any kind of a claim which his caprice or avarice might tempt him to assert. * * * The law will not tolerate such an imposition which might follow a denial of the validity of this clause in the contract. * * * A stipulation requiring a consignee of cattle to present any claim for damages at the time the cattle were received and before they were unloaded and mingled with the other cattle, has been held to be reasonable and valid.”

Parrill et al. v. Cleveland etc. R. R. Co., 55 N. E., 1026. In this case certain livestock was transported

under a livestock contract containing the following stipulation:

“No claim for damages which might accrue to the shipper under his contract, shall be allowed or paid by the carrier or sued for in any court by the shipper, unless a claim for such loss or damage should be made in writing, verified by the affidavit of the shipper, or his agent, and delivered to the freight claim agent of the carrier at his office in Cincinnati, Ohio, within five days from the time of the removal of the stock from the car.”

In sustaining the validity of this limitation the court said: “Where there is a special contract providing a necessity for reasonable notice of claim, the giving of such notice or the presentation of such claim being a condition precedent, it is a part of the plaintiff’s cause of action to show performance of this precedent obligation on his part or to show a waiver of performance or of strict formality.” (Citation.)

Atchison Etc. Ry. v. Crittenden, 44 Pac., 1000, 1001. In this case the special limited livestock contract had the following provision:

“As a condition precedent to the shipper’s right to recover any damages for loss or injury to said stock, he will give notice in writing of his claim therefor, to some officer of said party of the first part, or its nearest station agent, before said stock is removed from its place of destination above mentioned, or from the place of delivery of the same by said party of the second part, and before said stock is mingled with other stock.”

In upholding the validity of this clause the court, among other things, said: "These provisions of the contract are just and equitable. The company is entitled to a written notice that the shipper claims damages, so as to permit the company to have a thorough investigation made of the nature of the claim and the condition of the stock, before the stock is removed from its premises, or before it is mingled with other stock, so as to render its identification difficult. * * * Failing to comply with the terms of this contract in regard to giving notice, the shipper cannot recover."

Metropolitan Trust Co. v. Toledo Etc. Ry., 107 Fed., 628, 632. The livestock contract contained the following provision:

"That no claim for damages which may accrue to said second party under this contract, shall be paid by the said first party or sued for in any court by the said second party, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said second party, or his or their agent, and delivered to the general freight agent of the said first party at his office in the City of Evansville, Indiana, within thirty days from the time said stock is removed from said cars, and that if any loss or damage occurs upon a line of connecting carrier, then the carrier shall not be liable unless a claim be made in like manner, and delivered in like manner, to some proper officer or agent of the carrier on whose line the loss or damage occurs."

In upholding this provision of the contract the court held that such a stipulation is valid and reasonable, and quotes with approval a number of cases sustaining his position.

Smith v. Chicago Etc. Ry., 87 S. W., 9, 10. The contract contained the following provision:

“As a condition precedent to any damages or any loss or injury to livestock covered by this contract, the second party (plaintiff) will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party at destination, * * * and before such stock is mingled with other stock, such written notification to be served within one day after delivery of stock at destination. * * * That a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.”

In upholding this clause of the contract the court, among other things, said: “It is a further contention that plaintiff was not entitled to recover by reason of his failure to give notice as required by the contract, of his damages. It is conceded that no such notice was given, and it is not a matter of dispute but what the terms of the contract as to such notice included damages resulting from the death or shrinkage of the hogs. In such instances the giving of such notice is a prerequisite to the right of recovery.” (Citations.)

Houston Etc. Ry. Co. v. Mayes, 97 S. W., 318, 320. The contract had a clause which was substantially as follows:

“As a condition precedent to the shipper’s right to recover damages, he must give written notice to some general officer or agent of the company, of the loss, damage or injury sustained within ninety days of unloading the stock at destination.” It was held that the stipulation was reasonable and should be enforced.

St. Louis Etc. Ry. v. Pierce et al, 101 S. W., 760, 761. The livestock contract contained a clause as follows:

“That as a condition precedent to a recovery for any damages for delay, loss or injury to livestock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer, or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.”

In upholding the validity of this stipulation, the court says: “This provision of the contract is reasonable and binding. The stock was unloaded and sold within the time stipulated for the giving of the notice, and it imposed no unreasonable terms upon the plaintiffs in requiring them to give notice within that time

of their intention to claim damages. The giving of the notice within the time named was according to the stipulation and condition precedent to the right of recovery, and the burden of proof was upon the plaintiffs to show that they had given the notice."

Wichita Etc. Ry. v. Koch, 28 Pac., 1013, 1014. The shipping contract in this case provided as follows:

"That as a condition precedent to his right to recover any damages for loss or injury to said hogs, he will give notice in writing of his claim therefor to some officer of said party of the first part or its nearest station agent, before said stock is removed from the place of destination above named, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

The court held that such stipulation was reasonable, just and valid, and cites and quotes from a large number of cases to support his decision.

Wood v. Southern Ry., 24 S. E., 704, 705. The shipping contract in this case had the following stipulation:

"That as a condition precedent the shipper will give notice in writing of his claim for damages to the agent of the railroad company, actually delivering said stock to him * * * before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, and before said stock is intermingled with other stock."

The court upheld this stipulation, and among

other things said: "The object of such provisions in contracts like this, is that the defendant may have notice of the shipper's claim for damage in time to investigate the matter before the cattle are carried off and scattered, so that it cannot do so, or cannot do so with the same facility and satisfaction that it could at the place of delivery."

Southern Ry. Co. v. Adams, 42 S. E., 35, 36. This contract contained the following stipulation:

"It is further agreed that as a condition precedent to the right of the owner to recover any damages for any loss or injury to said livestock, he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination * * * and before said stock is intermingled with other stock."

In passing on this the court held that such stipulation is reasonable and binding upon the parties, and quotes approvingly from the decision of the United States Supreme Court in the case of *Express Co. v. Caldwell*, 21 Wall., 264, 268, as follows:

"The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitation. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim he may delay his suit. *It may also be remarked that the contract is not a stipulation*

*for exemption from responsibility for the defendant's negligence, or for that of their servants. * * * A common carrier is always responsible for his negligence, no matter what his stipulations may be, but an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is altogether of a different character; it contravenes no public policy; it excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity with the strictest rules of the common law ever required. * * **

As before stated, the evidence conclusively shows that no claim was ever made by the plaintiff at destination within ten days after the unloading and before the stock had been intermingled with other stock. It must be apparent to the court in this class of cases that it is absolutely impossible for the defendant to investigate and determine whether plaintiff in error's stock was injured, unless some such notice is given to the defendant in error, thereby making it possible for it to properly investigate the claim. Especially is this true where the claim is for abnormal shrinkage, which at best is a very speculative and conjectural proposition. However, as before stated, plaintiff in error specifically agreed by the terms of his contract that unless his claim was presented within ten days after the arrival of stock at South Omaha and before the stock was intermingled with other stock his claim would be waived, and certainly with-

out some notice defendant could not determine whether plaintiff was going to claim damages for alleged shrinkage or delay or rough handling or loss of the cattle, or whether he claimed damages for any reason.

We have seen fit to quote at length from a number of these cases, not because we ever had any doubt as to the validity of such stipulation, but for the reason that plaintiff in error has very earnestly contended before the lower court that said stipulations were void and against public policy, as an attempted limitation of the carrier's liability for its own negligence, but this can no longer be considered an open question since the recent decision of the United States Supreme Court upholding limited liability livestock contracts. We therefore contend that whatever, if any, right of recovery plaintiff in error in this case had, is barred by his failure to give defendant in error notice of his claim for damages as he agreed to do in the ninth clause of the shipping contract, and particularly is this true in this case for the reason that defendant in error had no notice of plaintiff in error's claim, or the nature of it, until long after the stock had been sold, intermingled with other stock and slaughtered, thereby making it absolutely impossible for defendant in error to determine whether or not there was any injury to said stock. For these reasons we submit the motion for non-suit was properly sustained.

PLAINTIFF IN ERROR'S BRIEF.

On page 17 of his brief, plaintiff in error makes the contention that there were two contracts of shipment, one reading from Baker, Oregon, to Minidoka, Idaho, and another from Minidoka, Idaho, to South Omaha, and then attempts to show that the shipments moved under the local rates applicable between these points, and that, as a matter of fact, the plaintiff did not secure the benefit of the lower rate in consideration of executing said livestock contract.

We are at a loss to know why or upon what theory plaintiff in error feels that he is justified in making such contention. He alleges in paragraph IV of his complaint, as shown on page 3 of the Transcript of Record, that the cattle were shipped to Minidoka, it being the intention of plaintiff, as known to the defendant, to continue the transportation of said cattle from Minidoka to South Omaha. Then again, plaintiff testified on page 68 of the Transcript of Record that he received through billing from Baker to Omaha, and that it was a through shipment with the right, as plaintiff testified on page 96 of the Transcript of Record, to stop the cattle at Minidoka for not to exceed 120 hours; that he first intended to take advantage of the feed in transit rate, but later changed his mind and took advantage of the through rate and that refund of over six hundred dollars was made to him on this basis, as shown by pages 96 and 97 of the Transcript of Record, but be that as it may, the United States Supreme Court has held in the case of *Cau v. Texas & Pacific Ry.*, 194 U. S., 427, 432:

“It is not necessary that an alternative contract be presented to the shipper for his choice. A bill of lading is a contract, and knowledge of its contents by the shipper will be presumed, and provision therein against liability for damages by fire is not unjust or unreasonable. It is not necessary that there be an independent consideration apart from that expressed in the bill of lading to support a reasonable stipulation of exemption from liability.”

To the same effect see *Arthur v. Texas & Pacific Ry. Co.*, 139 Fed., 127, 130.

On pages 28 et seq. of plaintiff's brief he makes the contention that the burden of proof is upon the carrier to prove the reasonableness of the stipulations contained in the livestock contract, then proceeds to cite some of the older authorities to that effect.

While this may have been the law at one time, plaintiff in error apparently overlooked the fact that since the passage of the Interstate Commerce Act as amended, the United States Supreme Court has held in cases without number that the tariff rates, rules, regulations, classifications and practices affecting classifications which are published and filed with the Interstate Commerce Commission, as required by law, are conclusively reasonable to everyone except the Interstate Commerce Commission, and a moment's reflection will show the justness of such a rule; for if it were otherwise, one inferior court might hold a rate or a regulation reasonable and another court hold the same rate or regulation unreasonable, and

by reason thereof it would be impossible for the carrier to abide by its published tariffs or shippers to know what rates, rules or regulations were in force and effect; so the framers of the Act to Regulate Commerce wisely placed the exclusive jurisdiction as to reasonableness of rates, rules and regulations with the Interstate Commerce Commission. Hence, it necessarily follows that it makes no difference in this kind of a case whether the tariff provisions relating to the presentation of claim at destination within ten days of unloading is reasonable or otherwise, so long as it remains in the tariff and is not canceled by order of the Commission.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 442.

Illinois Central Ry. Co. v. I. C. C., 206 U. S., 441, 464.

Meeker v. Lehigh Valley Ry. Co., 162 Fed. 354, 359.

Without unduly prolonging this brief, defendant in error contends that the motion for non-suit in this case was properly granted for the following reasons:

First. Whatever, if any, damage was caused to the shipment in question was sustained by causes and circumstances over which this defendant had no control.

Second. Plaintiff in error voluntarily unloaded his stock at Valley for the purpose of filling them up to place them on the Omaha market.

Third. The contract in evidence in this case is valid and binding and will be upheld as shown by the recent United States Supreme Court decisions.

Fourth. Plaintiff in error cannot recover in this action for the reason that he failed to give notice to the defendant or its agents at South Omaha before said stock had been unloaded and intermingled with other stock as he agreed to do under Section 9 of the livestock contract.

For the above reasons, we submit that the judgment of the lower court in sustaining defendant's motion for a non-suit should be affirmed, with instructions to dismiss the action.

Respectfully submitted,

W. W. COTTON,

A. C. SPENCER,

W. A. ROBBINS,

Attorneys for Defendant in Error.

12

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES G. KIDWELL,
Plaintiff in Error,

vs.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,
Defendant in Error.

No. 2247

Petition for Rehearing of Plaintiff in Error

Now comes the plaintiff in error herein and respectfully presents this his petition for rehearing.

In presenting this petition for rehearing we do so upon the ground that **we believe that this action was decided both in the court below and in this court upon a ground that was unnecessary for either court to consider at all** because the point herein advanced and argued in our opening brief obviates the neces-

sity of its consideration. The non-suit was granted in the court below for the reason that the plaintiff in error had not given notice of claim for damages assumed to be required under the evidence and pleadings in this matter, and the decision of the lower court was affirmed upon the same ground. We do not propose to question at this time the decision that the notice given was insufficient, but we do **most earnestly maintain that under the pleading and proof in this matter no notice whatever was necessary** and that the non-suit was therefore improperly allowed. We made this point on pages 20 to 23 of our opening brief and the point there raised was not answered in any way by the defendant in error in its brief and was not noticed by this court in its opinion.

We will first briefly call the court's attention to the allegations in the pleadings in this case. The fourth allegation in the complaint alleges in substance the delivery of the cattle by the plaintiff to the initial carrier at Huntington, Oregon, and alleges that the property was delivered for transportation over the line of railroad of the defendant and over the Union Pacific road to South Omaha, to such intermediate point upon the line operated by the defendant and the Union Pacific Railroad Company as the plaintiff might thereafter designate said stock to be consigned to plaintiff at such point of destination, the point of destination referred to, as we understand the matter, being the intermediate point between Huntington and South Omaha. The allegation

then is that these cattle were billed to plaintiff as consignee at Minnekoda, Idaho, it then being alleged that the intention of plaintiff to continue the transportation of said cattle from Minnedoka to South Omaha was known to the defendant. The allegation then further continues that the cattle were thereafter billed from American Falls to South Omaha, (American Falls being a station on the line of defendant's road East of Minnedoka, the point to which the cattle were first billed), and it is clear under the allegation in this paragraph that the cattle reached South Omaha under two billings, one from Huntington to Minnedoka, and one from American Falls to South Omaha. (Transcript, page 2). The fourth allegation of the answer (Transcript, page 32) alleges that the cattle were billed to Minnedoka, Idaho, and the fifth allegation (Transcript, page 35) that they were afterwards reloaded and shipped from American Falls to South Omaha.

The answer of the defendant (Transcript, pages 22 to 32) sets forth the bill-of-lading under which these cattle moved from Huntington to their destination under that bill-of-lading; that is, Minnedoka, Idaho.

We herewith respectfully call this court's attention to the fact that there is nothing in the pleadings or evidence showing any of the stipulations of the bill-of-lading from American Falls to South Omaha, and it was assumed by the court in its decision that the bill-

of-lading from American Falls to South Omaha contains some stipulation requiring claim for loss or damage to be put in within ten days after the arrival of the stock at South Omaha. It is true that the second and third paragraphs of defendant's further and separate answer and defense set forth certain rules and regulations effecting the transportation and carriage of livestock as governed by the tariff filed with the Interstate Commerce Commission. That these tariffs were filed and contain matter alleged in the answer is denied by the second paragraph of plaintiff's reply to such separate answer and defense. No proof was offered that the defendant had ever filed such tariff as alleged and no proof was offered that the bill-of-lading or contract under which these cattle were shipped from American Falls to South Omaha contained any stipulation or provision requiring any notice whatsoever.

In the case of Hartwell Ry. Co. vs. Kydd, 74 S. E., 310, it is decided that the court does not take judicial notice of tariffs filed with the Interstate Commerce Commission, and that a party relying thereon must prove the same. No proof having been offered we do not think that this court can properly take notice of any stipulation or conditions which might have been contained in the shipping contract under which this stock moved from American Falls to South Omaha.

To briefly reiterate, there is one bill-of-lading, the contents of which are proven and which may be

properly considered in determining this case, and that is the bill of-lading from Huntington to Minnedoka. There is no proof whatever that the shipping contract issued from American Falls to South Omaha required any notice of damage to be given to any one at any time.

The honorable trial court in granting the nonsuit (Transcript, page 168) uses the following language: "When the stock arrived at Minnedoka which is now claimed to be the end of the first shipment, the consignee refused to unload them; refused to take them off the train. If that was the end of the contract it was his duty to do that * * * * * But he refused to unload them at that place because there was no proper stock-yard for rest and feed." In coming to this conclusion the trial court was in error. The only evidence touching upon this matter appears on pages 47 and 48 of the transcript. The testimony in brief is this: That the cattle arrived at Shashone at 3:30 o'clock a. m. on December 5th (Transcript, page 44); that there was not sufficient facilities there for unloading the cattle for feed, rest and water; after an endeavor by the employes of the defendant to unload the cattle at Shoshone (which is West of Minnedoka) it was decided to run these cattle on. It was then discovered or first made known to the plaintiff that there was no yard at Minnedoka, it having burned down. A telegram was then sent to the Superintendent or Division Superintendent, or some one in authority, and the

engine was coupled to the train. We quote now from page 48: "When I (plaintiff in error testifying) started I said to the agent, I says: 'No yards at Minnedoka, so this man says.' 'Well,' he says, Minnekoda is where they are billed and Minnedoka is where they will go.' That is all there was to it. The cattle went on to American Falls, never stopped at Minnedoka at all. The railroad men couldn't unload these cattle at Shoshone; they didn't have a chance to. We left Shoshone at 11:15 a. m. on December 5th, and arrived at American Falls just a few minutes after four o'clock that evening."

Now, we desire particularly to call the court's attention to the bill-of-lading which is proven. That is, the bill-of-lading from Huntington to Minnedoka. This bill-of-lading says that notice of loss, etc., shall be put in at the point of destination. The point of destination is the point in this bill-of-lading; that is to say, Minnedoka. The evidence which we have quoted above is the only evidence showing the movement of these cattle from Shoshone to American Falls and is conclusive that the cattle were **rushed through the point of destination without any stop whatever, and for the reason that the railroad company had not provided any facilities for unloading these cattle at the point of destination.** On page 51 of the transcript it further appears that the plaintiff paid nothing whatever for the transportation of these cattle from Minnedoka to American Falls. Now, it seems clear to us as a matter of principle if there were no decisions whatever to support our

view, that where a shipment is taken by the carrier beyond the point of destination in the bill-of-lading that a stipulation for the giving of notice at the point of destination is nullified.

We call the court's attention to the case of Cleveland C. C. & St. L. Ry Co. vs. C. M. A. Potts & Company, 71 N. E., page 685. See pages 688 and 689 and cases therein cited, holding that any deviation from the contract of carriage will deprive the carrier of limitations of liability in the contract.

It will be further noticed that in this particular instance the failure of the carrier to deliver the stock at the point of destination was the result of its not having proper facilities there to take care of the cattle. We call the court's attention to the evidence of plaintiff on pages 41 and 42 of the transcript to the effect that at the time these cattle were billed from Huntington to Minnedoka that he was led to believe by the agent for the railroad company that there were stock-yards at Minnedoka and facilities for unloading these cattle, which evidence is not contradicted. We believe that a consideration of the matters pointed out herein will convince this court that there is no evidence that any notice was required at South Omaha and that the act of the defendant in transporting these cattle through Minnedoka without even stopping, which act was rendered necessary by its own fault, would certainly relieve this plaintiff from giving notice of damage at Minnedoka, the point of destination named in the bill-of-lading, be-

ing the only contract of shipment proven, and if we are right in these matters this case has been decided upon a point which had no place whatever in the case.

We will add that there are two other phases of this case which are referred to in the brief of the defendant; also in the opinion rendered by the trial judge. We do not see, however, that they militate at all against the propositions we have advanced. The first of these is that the plaintiff informed the initial carrier that the stock was intended for the market at South Omaha; that he desired a through shipping with a stop-over privilege. This, however, the agent of the initial carrier said he could not give but would ship the cattle to some point in Idaho at a local rate and that the matter of tariff upon the final delivery of the cattle at South Omaha could be adjusted. We can conceive of no theory upon which this could extend the provision in the bill-of-lading issued from Huntington to Minnedoka to the shipment upon arriving at South Omaha. It is not necessary to cite any authorities to the effect that these provisions are construed against the carrier and no idea suggests itself to us as to why this information so imparted to the initial carrier as to the contemplated final destination of this stock should make the provision of the bill-of-lading from Huntington to Minnedoka extend beyond its point of destination.

There is one other proposition along the same

line, and that is that upon the return of the plaintiff to Portland he secured and received a rebate of \$600.00, this being the amount that he paid in excess of what he would have paid if these cattle had gone through from Huntington to Omaha on a through billing, but we cannot conceive of any proposition of law by which this act of the plaintiff in receiving a rebate of \$600.00 would make this stipulation in the contract shipping the cattle from Huntington to Minnedoka cover the shipment from American Falls to South Omaha.

We therefore most respectfully submit to this court that a careful consideration of the points advanced in this petition will convince the court that our contention herein is right and that this petition for a rehearing should be granted and the case remanded for a new trial.

Respectfully submitted,

J. L. SHARPSTEIN,
F. B. SHARPSTEIN,

W R. KING,

F. M. SAXTON,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. W. LUEDERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Southern Division.

FILED
JUL 1 - 1913

No. 2260

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. W. LUEDERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Southern Division.

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JOHN J. SULLIVAN, Esquire, Assistant United
States Attorney, Federal Building, Seattle,
Washington,
Attorneys for the Defendant in Error.

*United States District Court, Western District of
Washington, Southern Division.*

July Term, 1913.

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Indictment.

The United States of America,
Western District of Washington,—ss.

The grand jurors of the United States of America,
duly empaneled, sworn and charged to inquire within
and for the Western District of Washington, upon
their oaths, present:

That heretofore, to wit, on or about the 23d day

of February, 1912, one A. W. Lueders, within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, while he was a bankrupt under the Bankruptcy Act, did wilfully, knowingly, fraudulently and unlawfully conceal and cause to be concealed from one J. M. Phillips, who was then and there the duly appointed, qualified and acting trustee in bankruptcy of said A. W. Lueders, a bankrupt, certain property to which said estate then and there had a certain right, claim and interest to the title therein, the extent of which is to these grand jurors unknown, to wit: Certain lands situated in the county of Morrow, State of Oregon, described as follows: The east half of the northeast quarter of section twenty-seven (27); [1*] the north half of section twenty-six (26); the northeast quarter of the southwest quarter of section twenty-six (26); the north half of the southeast quarter of section (26) twenty-six; the southeast quarter of the southeast quarter of section twenty-six (26); the south half of section twenty-six (26); the south half of the north half of section twenty-six (26); the north half of the north half of section thirty-six (36); the west half of the northeast quarter of section thirty-five (35), all in township three (3) south of range twenty-five (25) east of the Willamette meridian, and the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section thirty (30), in township three (3) south of range twenty-six (26) east of the Willamette meridian, said

*Page-number appearing at foot of page of original certified Record.

property being then and there of great value, to wit, of the value of twenty-five thousand dollars (\$25,000.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

B. W. COINER,

United States Attorney,

LOUIS E. SHELA,

Assistant United States Attorney.

Witnesses examined before grand jury:

J. M. Phillips.

Mrs. L. W. Reinhardt

Carl Buege.

P. E. Alvord.

Helen King.

N. E. Winnard.

J. A. Veness.

G. R. Snider. [2]

[Endorsed]: "Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, September 20, 1912. Frank L. Crosby, Clerk. By Frank M. Harshberger, Deputy." [3]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Demurrer.

The defendant, A. W. Lueders, demurs to the in-

dietment and to the first and only court contained therein, upon the following grounds:

I.

That said indictment does not state any facts sufficient to charge this defendant with an offense of having knowingly and fraudulently concealed, while a bankrupt, any property belonging to the estate in bankruptcy, and that said indictment is vague, indefinite and does not inform defendant of the specific offense with which he is charged, the charging part thereof being only a conclusion which should be properly drawn from stated facts.

II.

That said indictment is in form and manner insufficient to charge this defendant with the commission of a crime.

WHEREFORE, defendant prays the judgment of this Court as to whether or not he shall be compelled to [4] further plead to said indictment.

MAURICE A. LANGHORNE,
ELMER M. HAYDEN,

Attorneys for Defendant, 408 Perkins Bldg., Tacoma, Washington.

I, E. M. Hayden, one of the attorneys for the defendant in the above-entitled action, do hereby certify that in my opinion the foregoing demurrers is well taken in point of law.

ELMER M. HAYDEN.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Oct. 4, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [5]

In the United States District Court, for the Western District of Washington, at Tacoma, on the 15th day of October, A. D. 1912, Before the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court, among others the following proceedings were had:

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Arraignment and Plea of "Not Guilty."

The above-named defendant coming into open court at this time, in his own proper person, for arraignment under the indictment heretofore returned against him, being interrogated as to his true name, he answered that his true name is as in the said indictment stated, and the reading of said indictment being waived, being interrogated as to his plea, he answered that he was not guilty as charged in the said indictment. Whereupon said cause was set for trial for December 17th, 1912. [6]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

**Order Overruling Demurrer and Directing Plaintiff
to Furnish Defendant With a Bill of Particu-
lars.**

This cause came on to be heard upon the demurrer of the defendant to the indictment, and the Court having heard the arguments of counsel, and being fully advised in the premises,—

IT IS ORDERED, That said demurrer be, and the same is hereby overruled; AND

IT IS FURTHER ORDERED, That the plaintiff furnish the defendant with a bill of particulars showing the manner of the concealment of the assets alleged in the indictment, at least ten (10) days before the trial of the above-entitled cause.

Done in open court this 15th day of October, 1912.

EDWARD E. CUSHMAN,

Judge.

To the above order overruling the demurrer, the defendant excepts, which exception is hereby allowed.

EDWARD E. CUSHMAN,

Judge. [7]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Oct. 15, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [8]

*United States District Court, Western District of
Washington, Southern Division.*

November Term, 1912.

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Bill of Particulars.

Comes now the above-named plaintiff, by B. W. Coiner, United States Attorney, and pursuant to order of Court heretofore entered herein, furnishing said defendant this Bill of Particulars herein, says:

That the manner of concealment of the assets referred to in the indictment herein is as follows:

That the said defendant having bought certain property in the town of Winlock, in the State of Washington, commonly known as the "St. James Hotel property," from one Carl Buege, did take the title to said property in the name of Mrs. L. W. Reinhardt without any consideration moving to said Mrs. Reinhardt therefor; that thereafter said defendant did procure the said Mrs. L. W. Reinhardt, without any consideration therefor, to transfer said property by deed to one Maud E. Everitt, and that said Maud E. Everitt did thereafter trade said property for the

following described property situated in the State of Oregon, to wit:

The east half of the northeast quarter (E. $\frac{1}{2}$ NE. $\frac{1}{4}$) of section twenty-seven (27), township three (3) south, range twenty-five (25) east;

The north half (N. $\frac{1}{2}$), the northeast quarter of the southwest quarter (NE. $\frac{1}{4}$ SW. $\frac{1}{4}$), and the north half of the southeast quarter (N. $\frac{1}{2}$ SE. $\frac{1}{4}$), and the [9] southeast quarter of the southeast quarter (SE. $\frac{1}{4}$ SE. $\frac{1}{4}$); all in section twenty-six (26) township three (3) south, range twenty-five (25) east;

The south half (S. $\frac{1}{2}$) and the south half of the north half (S. $\frac{1}{2}$ N. $\frac{1}{2}$) of section twenty-five (25), township three (3) south, range twenty-five (25) east;

The north half of the north half (N. $\frac{1}{2}$ N. $\frac{1}{2}$) of section thirty-six (36), township three (3) south, range twenty-five (25) east;

The west half of the northeast quarter (W. $\frac{1}{2}$ NE. $\frac{1}{4}$) section thirty-five (35), township three (3) south, range twenty-five (25) east;

The southwest quarter of the northwest quarter (SW. $\frac{1}{4}$ NW. $\frac{1}{4}$) of section thirty (30), township three (3) south, range twenty-six (26) east;

The northwest quarter of the southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of section thirty (30), township three (3) south, range twenty-six (26) east.

with the intent and purpose on the part of him, the said defendant, to conceal all of the said property

from the trustee in bankruptcy mentioned in the indictment herein.

B. W. COINER,
United States Attorney.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Dec. 6, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."

We hereby acknowledge service of the foregoing Bill of Particulars, and the receipt of a true copy thereof, this 30th day of November, 1912.

HAYDEN & LANGHORNE,
Attorneys for Defendant. [10]

[Minutes of Trial.]

In the United States District Court, for the Western District of Washington, at Tacoma, on the 17th day of December, A. D. 1912, before the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court, among others, the following proceedings were had:

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

RECORD OF TRIAL.

This cause coming on regularly for trial at this time, the defendant appearing in his own proper person and by his attorney, M. A. Langhorne, Es-

quire, and the plaintiff appearing by its attorney, C. F. Riddell, Esquire, a jury having been ordered, the following named persons answered to their names, and were sworn, examined and empanelled to try said cause:

William W. Brown.	J. H. Price.
Fred D. Marr.	M. Carlson.
James Callahan.	T. O. Hendricks.
J. S. Kinnaman.	Frank Morgan.
P. T. McGraw.	B. Kinnaman.
Charles Gouty.	Bert L. Austin.

Whereupon the trial regularly proceeded with the introduction of evidence, oral and documentary, on the part of the plaintiff and defendant, the following witnesses testifying on behalf of the Government:

F. M. Harshberger.	P. E. Alvord.
J. M. Phelps.	Helen King.
Carl Buege.	Dr. O. M. Sullivan.
Mrs. Anna Reinhardt	Wm. S. Swaggart.
J. A. Veness.	A. W. Shelly.
Mrs. Nellie Shelly.	N. E. Winnard.

and the following witnesses testifying on behalf of the [11] defendant, A. W. Lueders, whereupon the hour of adjournment having been reached, the jury was cautioned by the Court and permitted to separate until the next incoming court. [12]

In the United States District Court, for the Western District of Washington, at Tacoma, on the 18th day of December, A. D. 1912, before the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court, among others, the following proceedings were had:

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

RECORD OF TRIAL (VERDICT).

This cause coming on at this time for further trial, the plaintiff appearing by its attorney, C. F Riddell, Esquire, and the defendant appearing in Court in his own proper person and by his attorney, M. A. Langhorne, Esquire, the calling of the jury being waived, it appearing that all persons were present in their proper places, the trial regularly proceeded by the introduction of evidence, oral and documentary on the part of the plaintiff and defendant, the following witnesses testifying for the plaintiff: A. S. Hoonan, Clyde L. Philliber, J. A. Cross, and the following witnesses testifying for the defendant: W. H. Kenoyer, George P. Wall, Mrs. Maude Lueders, whereupon at the conclusion of the evidence and the arguments of counsel, the jury was charged by the Court, and retired (at 3:45 P. M.) in the custody of a sworn bailiff for deliberation upon their verdict.

And thereafter, at 8:10 P. M., said jury returned into open court, returned by their foreman, and in the presence of the other jurors, the following verdict, which [13] was ordered filed as the verdict in this case:

“We, the jury in the above-entitled case, find the

defendant A. W. Lueders guilty as charged in the indictment therein filed.

J. H. PRICE,

Foreman." [14]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant, A. W. Lueders, guilty as charged in the indictment therein filed.

J. H. PRICE,

Foreman.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Dec. 18, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [15]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Motion for a New Trial.

Now comes the defendant in the above-entitled case and petitions and moves the Court to set aside the verdict of the jury rendered in this action and to grant a new trial upon the following grounds:

I.

Error of law occurring at the time of the trial and duly excepted to by the defendant.

II.

And especially does the defendant assign error of law in the admission of the testimony of John A. Cross, the said Cross being permitted to read certain testimony given by the defendant Lueders in the former proceeding from the typewritten copy of the same, without being able to testify that he had any independent recollection of the testimony so given by the said defendant Lueders in that proceeding.

III.

That the evidence is insufficient to justify the verdict of the jury. That the evidence is insufficient in that it does not show that any demand was ever made upon the [16] defendant to surrender to the trustee in bankruptcy the property described in the indictment, nor does the evidence show that the defendant knowingly, wilfully or fraudulently concealed the property described in the indictment from the trustee in bankruptcy.

This motion is made on the files and records of this action and on the minutes of the Court, including the notes of the evidence taken by the reporter at the time, and upon all the testimony and

all the rulings made and excepted to during the progress of the trial, and upon the pleadings on file in the office of the clerk of this court.

HAYDEN & LANGHORNE,
Attorneys for Defendant, 408 Perkins Bldg., Tacoma, Washington.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Dec. 19, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [17]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Order Overruling Motion for a New Trial.

The above-entitled cause coming on duly and regularly for hearing on the 30th day of December, 1912, on the motion of the defendant for a new trial herein,

IT IS HEREBY ORDERED that said motion be, and the same is hereby, overruled. To the entry of this order, the defendant duly excepted and his exception was entered and allowed.

IT IS FURTHER ORDERED that this order be entered to complete the records in the above-entitled cause as of the date December 30, 1912, and this

order hereby is entered nunc pro tunc.

DONE IN OPEN COURT this 10th day of February, 1913.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [18]

In the United States District Court, for the Western District of Washington, at Tacoma, on the 30th day of December, A. D. 1912, before the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court, among others, the following proceedings were had:

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Judgment and Sentence.

Comes now on this 30th day of December, A. D. 1912, the said defendant, A. W. Lueders, into open court for sentence, and being informed by the Court of the indictment herein against him, and of his conviction of record herein, he is asked by the Court whether he has any legal cause to show why the sentence of this Court should not be pronounced and judgment had against him at this time, he nothing

says save as he before hath said.

Wherefore, by reason of the law and the premises, it is ordered by the Court that the said defendant, A. W. Lueders, be punished by being imprisoned in the County Jail of Pierce County, Tacoma, Washington, or in such other place as may hereafter be provided for the imprisonment of offenders against the laws of the United States, for a term of nine months.

On motion of the attorney for defendant, the Court orders that defendant may go on his present bond until Tuesday, December 31, 1912, at 4 P. M., within which time defendant shall present a duly executed bond in the sum of \$2,000 for approval by the Court.
[19]

**[Notice of Preparation and Service of Bill of
Exceptions.]**

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

To B. W. COINER, United States District Attorney:

PLEASE TAKE NOTICE that the undersigned has prepared Bill of Exceptions in the above-entitled action, original of which has been filed in the office

of the clerk of the United States District Court and a copy of which is hereby served upon you.

ELMER M. HAYDEN and

MAURICE LANGHORNE,

Attorneys for Defendant, 408 Perkins Bldg., Tacoma, Washington. [20]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Bill of Exceptions.

Now, on this 17th day of December, A. D. 1912, the above cause coming on for trial in the above-entitled court before the Honorable E. E. CUSHMAN, Presiding Judge thereof, and the jury duly empanelled therein; and

The United States of America being represented by Honorable B. W. COINER, United States Attorney, and Mr. C. F. RIDDELL, Assistant United States Attorney; and

The defendant, A. W. Lueders, being present in person and represented by his attorneys, Messrs. Hayden & Langhorne;

The following proceedings were had, to wit: [21]

The defendant's case having been duly stated to

(Testimony of F. M. Harshberger.)

the jury by Mr. Langhorne, Esq., and having been replied to by Mr. Riddell, Esq., on behalf of the Government, the following evidence was introduced:

[Testimony of F. M. Harshberger, for the Government.]

F. M. HARSHBERGER, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

I am deputy clerk, United States District Court; I identify the three papers handed me as being original papers on file in the bankruptcy proceedings of A. W. Lueders.

Mr. RIDDELL.—I offer in evidence the application for adjudication in bankruptcy, the original application.

Mr. LANGHORNE.—Objected to on the ground of privilege under the statute.

Mr. RIDDELL.—The schedules are attached to this petition, and I will ask the Court to make a ruling that the petition may be admitted in evidence, and that the Government may copy the same without the schedules, and that only the copy of the petition may go to the jury, as Plaintiff's Exhibit 1.

Mr. LANGHORNE.—I still object on the ground of privilege under the statute; no pleading in bankruptcy or paper of any kind can be offered and received in evidence at the trial of a case where a bankrupt is charged with an offense against the bankruptcy law.

(Testimony of F. M. Harshberger.)

The COURT.—Objection overruled, and the clerk will seal [22] up the schedules, and

Gentlemen of the Jury, when this paper goes out with you at the conclusion of the case, you will observe the seal of the court and not undertake to break it. It is simply the petition which is being admitted. You will not break any seal to discover what the other papers disclose. Objection overruled.

Thereupon said petition in bankruptcy was marked Plaintiff's Exhibit 1.

Mr. RIDDELL.—I now offer in evidence the order of adjudication, as being Plaintiff's Exhibit 2, and the order of reference as Plaintiff's Exhibit 3.

The COURT.—Admitted.

No cross-examination.

[Testimony of J. M. Phillips, for the Government.]

J. M. PHILLIPS, witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

I am an attorney at law. I live at Aberdeen. I know the defendant, A. W. Lueders, when I see him. I have had no official connection or dealings with him whatever. I was, however, appointed trustee in a case in which he was interested. I identify the signature on the paper shown me as that of J. E. Stewart, who is Referee in Bankruptcy. The paper above shown me is the appointment of myself as trustee.

Mr. RIDDELL.—We offer this paper in evidence

(Testimony of J. M. Phillips.)

as Plaintiff's Exhibit 4.

Mr. LANGHORNE.—We object, for the reason that it has never become an order of the Court; never been filed, [23] recorded or approved.

The COURT.—Objection overruled. Exception allowed.

A. I identify my signature appended to the paper now shown me.

Mr. RIDDELL.—We offer that in evidence as Plaintiff's Exhibit 5.

A. The paper shown me (Plaintiff's Exhibit 5) was signed February 23, 1912, or about that time. I identify identification No. 6, containing the signatures of Dr. Chamberlain and one McIntyre. I also identify the paper marked Plaintiff's Identification No. 7, containing the signature of J. E. Stewart.

Mr. RIDDELL.—I now offer in evidence Plaintiff's Exhibits 5, 6 and 7.

Mr. LANGHORNE.—I object to each of them, because they are not official records of this court, and I object especially to identification No. 6, purporting to be the bond of the trustee because it has never been approved.

The COURT.—Objection overruled and exception allowed.

Thereupon said papers are marked, respectively, Exhibits 5, 6, and 7.

Q. Mr. Phillips, in your position as trustee in bankruptcy of A. W. Lueders, what property came into your possession? A. No property at all.

Q. What property to your actual knowledge did

(Testimony of J. M. Phillips.)

the defendant own at the time the petition in bankruptcy was filed? A. None at all.

Q. None you actually knew of?

A. None I actually knew of.

Q. Did you ever come into possession as trustee, or have [24] anything to do with property known as the St. James Hotel property at Winlock?

A. No, sir; I was not aware of defendant's ownership of any real estate.

Cross-examination.

(By Mr. LANGHORNE.)

Q. You say there was no property of the bankrupt that came into your possession. Don't you know as a matter of fact that his books, his library, and his wearing apparel were set aside by the Court as exempt property? A. Yes, that is true.

[Testimony of Carl Buege, for the Government.]

CARL BUEGE, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

I reside at Chehalis, Lewis County, Washington. I know the defendant. I had dealings with him about 1905. I sold him a house and lot in Winlock. The property was known as the St. James Hotel property. I sold the property under written contract. I don't know where the contract is now. I haven't any copy of it. I suppose I destroyed the copy when the last payment was made. I sold him the property in question for eight hundred dollars.

(Testimony of Carl Buege.)

One hundred dollars was paid down and he paid me so much a month thereafter until the whole sum was paid. He made the last payment about the time I gave him the deed. I can't recall the date the last payment was made. [25] I was in Winchester, Grant County, Washington, and he was in Winlock. I don't know now where the deed is that I gave him. I made out two deeds to the property. I made out the first deed to Mrs. Reinhardt at his request, then afterwards he wanted me to make out a deed to someone else. I never found out who that someone else was. I signed the deed in blank and sent it to Winlock. The second deed conveyed the same identical property as the first deed.

Mr. RIDDELL.—I now offer in evidence Plaintiff's Exhibit No. 8.

The COURT.—It will be admitted.

Thereupon said paper is received in evidence and marked Plaintiff's Exhibit 8.

I contracted to sell Dr. Lueders this property some time in August, 1905. The contract was drawn up by George I. Brooks, attorney at law, who then lived at Winlock but now in Portland, Oregon. Dr. Lueders finished paying for it in 1907, and I executed the first deed some time in August of that year.

**[Testimony of Mrs. Anna Reinhart, for the
Government.]**

Mrs. ANNA REINHART, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

(Testimony of Mrs. Anna Reinhart.)

Direct Examination.

(By Mr. RIDDELL.)

My name is Anna Reinhart. I am the wife of L. W. Reinhart. I live at Oak Grove, Oregon. I know the defendant, I have known defendant for seven or eight years. He lived at Winlock when I first became acquainted with him. I never owned any property at [26] Winlock. I don't know that I ever had title to any property there. I do not know that I ever had a deed to any property there. I do not know that I ever made a deed to any property down there. I know the property at Winlock known as the St. James Hotel property. I do not know that I ever owned that property. If I ever had a deed to it, I don't know it. If I ever had a deed from Carl Buege, I don't know it. I testified before the grand jury. I do not remember what my testimony was there. I do not remember of being asked any of the questions which have just been propounded me.

Mr. LANGHORNE.—Let me examine her a minute. There is nothing to conceal here.

Mr. RIDDELL.—I would like to examine the witness, your Honor. This witness is evidently just a little frightened, and I think if I may be permitted to refresh her recollections a little bit I can straighten her out.

Mr. RIDDELL.—Do you remember, Mrs. Reinhart, when you were before the grand jury, I asked you if you had ever gotten a deed from Mr. Buege?

A. Yes, but I could not say that it was a deed. If Mr. Buege deeded this Winlock property to me, I

(Testimony of Mrs. Anna Reinhart.)

don't know it.

Q. Tell the jury what you do know about the transaction.

A. Well, I know that there was an instrument made to me but I never saw it. I don't know what it was. I have signed deeds at my husband's request, but who the grantee was I do not know. If there was a deed made to Dr. Lueders or Miss Everitt from me [27] I do not know of it. I do not now recall that fact. If there was a deed made to me of the Winlock property I did not pay anything for it. I never had any correspondence with Dr. Lueders about the matter. Neither did I ever receive any letters from him.

Mr. RIDDELL.—We offer in evidence those two copies of deeds.

Mr. LANGHORNE.—No objection.

The COURT.—They may be admitted.

Thereupon said copies of deeds are marked as Plaintiff's Exhibits 9 and 10.

Cross-examination.

(By Mr. LANGHORNE.)

My husband is a traveling man. When on his travels he often stopped at Winlock at the St. James Hotel. He was acquainted with Dr. Lueders, and they were very close friends. I understood that Dr. Lueders had placed this property in my name, but I had no personal knowledge of that fact. My husband told me that Dr. Lueders had done so. Some time afterwards my husband called upon me to execute a deed. I signed my name to it without know-

(Testimony of J. A. Veness.)

ing to whom the deed ran, or anything about the description of the property.

[Testimony of J. A. Veness, for the Government.]

J. A. VENESS, a witness called for and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is J. A. Veness. I live in Winlock, Washington. I am a member of the J. A. Veness Lumber [28] Company. I know the defendant. I also know his present wife. I know the property down there known as the St. James Hotel property. I once loaned money on that property. It came about in this way: Dr. Lueders wanted to borrow some money on that property; I do not know whether he wanted it for himself or someone else, but when I took the mortgage it belonged to another party, and the other party signed the mortgage. Dr. Lueders negotiated the loan. I did not ask him whether the money was for himself or someone else. I never had any dealings in which that property was concerned before that time. I had furnished a little lumber before the occasion I speak of. I afterwards furnished the lumber when the hotel was built. The mortgage was taken after the lumber was furnished. He furnished me an abstract of the property which was examined by my attorney, Mr. Langhorne, and he found the title thereto was in the name of Miss Everitt. Dr. Lueders and Miss Everitt occupied the property at the time. I knew that Dr. Lueders had

(Testimony of J. A. Veness.)

a wife. At one time he wanted me to take title to the property in my own name. This was before I ever furnished lumber for any purpose. He suggested that I take a deed to it, as he was having some trouble with his first wife and wanted to protect himself. After the property was improved, I made him an offer of four thousand dollars for it. I never had any dealings with Miss Everitt in connection with the property. If she owned the property, I suppose he was her agent. [29] Dr. Lueders negotiated the loan anyway. I do not know the time Dr. Lueders and Miss Everitt were married. Once when I was in Portland Dr. Lueders told me they were married. I can't tell you whether that was two or three years ago. At the time he told me this I was on my way to either China or California. I was just trying to decide which place it was, when I met them in Portland. If I knew I could tell you exactly when he told me they were married. When Dr. Lueders asked me to take title to the property, he did not ask for any consideration. I can't say when this conversation was had, I am all at sea about it, because I do not know. However, I do know that the conversation about taking the property in my name was before the mortgage.

Q. Do you remember how or from whom the repayments on the three-thousand-dollar loan occurred?

Mr. LANGHORNE.—Were those payments accompanied by written communications?

A. I will tell you about those payments. My bookkeeper is authorized to sign checks and deposit

(Testimony of J. A. Veness.)

money, and that transaction probably went through the bank and through my office and I never saw it; I could not tell. My bookkeeper does that business and I think some of that was paid when I was away in the Orient.

Cross-examination.

(By Mr. LANGHORNE.)

When the abstract was examined, I was informed that Dr. Lueders had no record title to the property; the title stood in the name of E. Maude Everitt. I knew [30] at the time that Dr. Lueders was married and was not living with his wife. I know that was before I took the mortgage on the property that he spoke to me about taking the title in my name. At the time of this conversation the property was being used for a hospital and not for hotel purposes. It was made over into a hotel afterwards.

Redirect Examination.

(By Mr. RIDDELL.)

I do not remember what Dr. Lueders said about the nature of his family trouble.

[Testimony of P. E. Alvord, for the Government.]

P. E. ALVORD, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is P. E. Alvord. I live in Portland, Oregon. I have lived there for about three years. I know the defendant Lueders in a business way and have had dealings with him. In April or May, 1911,

(Testimony of P. E. Alvord.)

I met Dr. Lueders and Miss Everitt together. I knew that they wished to dispose of the St. James property and I had gotten in touch with Mr. Huddleston and Dr. Winnard in Eastern Oregon, who had some wheat land they wanted to exchange for property in or near Portland. I got these parties together, looking to an exchange of the property, and Dr. Lueders said he would go over and look at the property in Eastern Oregon, and he did so and thereafter an arrangement was made, subject to the acceptance of Miss Everitt, and papers [31] were drawn up by an attorney and signed by the parties at Heppner, Oregon, and the next day I returned with Dr. Lueders to Aberdeen and saw Miss Everitt, and the matter was agreed to and the contract signed. Dr. Lueders never told me anything about his marriage relations with Miss Everitt. He told me, however, about a year ago, that they were married. There was some difference between the value of the two properties and the sum of fourteen or fifteen hundred dollars in case was paid to the Oregon parties. I got that money from Miss Everitt. It was in cash. I have been in the Hotel St. James at Winlock. Last time I stopped there a man by the name of Williams was running the hotel. Before that Dr. Lueders and Miss Everitt were occupying the same when I first stopped there, and afterwards the hotel was leased and changed tenants several times. I do not know what Dr. Lueders made in his profession. He told me he was doing very well. I think he told me he was making four or five hundred a month.

(Testimony of P. E. Alvord.)

This conversation occurred some time after this deal was made. The value of the Oregon property was twenty-five or twenty-six thousand dollars, upon which there was a mortgage of twelve or thirteen thousand dollars. The St. James property was valued at eleven thousand dollars.

Mr. RIDDELL.—I offer in evidence certified copy of the deed.

Mr. LANGHORNE.—No objection.

Thereupon said certified copy of deed is received in evidence and marked as Plaintiff's Exhibit 11.

[32]

Cross-examination.

(By Mr. LANGHORNE.)

I first became acquainted with the St. James Hotel property in Winlock four or five years ago. At that time it was just being converted into a hotel. At that time Miss Everitt spoke to me about wishing to get her money out of the hotel. She was the first person that ever approached me about selling the property. The value put on the lands in Oregon was rather arbitrary. The parties who had those lands could not carry them and the mortgage too. They took the St. James Hotel at a great big price in order to get rid of the lands they held down in Oregon.

Redirect Examination.

(By Mr. RIDDELL.)

I cannot say that I am really familiar with values in Winlock, and I think the value of the St. James Hotel property at the time of the transfer was seven or eight thousand dollars.

(Testimony of P. E. Alvord.)

Recross-examination.

(By Mr. LANGHORNE.)

I don't know what gave it that value, unless it was the cost of building and the equipment. It once rented for one hundred dollars per month. The parties that rented it went into bankruptcy.

[Testimony of Helen King, for the Government.]

HELEN KING, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.) [33]

My name is Helen King. I live in Spokane, Washington. My occupation is that of a nurse. I know the defendant. I also know his wife. I first met him seven or eight years ago at Walla Walla. I went to Winlock in 1905 or 1906. Dr. Lueders was there at that time. I remained there two years. I left some time in 1907. Miss Everitt came to Winlock while I was there. She came to take up nursing. She was not a nurse at the time. She came to learn. I suppose she was to receive a salary of ten dollars a month, which is the average pay of nurses in training. I do not know what property, if any, she had when she came there. If she had any I do not know it. I do not know how long Miss Everitt had been there before the title of the property was placed in her name. I think she came there in 1906, about the first part of the year, but I am not positive. It is such a long time since I worked there I have forgotten dates. I had a conversation with Dr. Lueders

(Testimony of Helen King.)

about the title of the property about one year after I left there. He told me he had the property transferred to Mrs. Reinhardt. He never told me anything else about it at that time or any other time. When I was there this property was known as the Winlock Hospital. It was built while I was there. I do not know anything about the cost of it. I never had any conversation with Dr. Lueders relative to the cost. I know that [34] Dr. Lueders was paying for it, but I don't know how much he paid. He made payments to Mr. Buege, the man he bought it from and to Mr. Veness for lumber. I don't know how much he paid for it. There were some fifteen or sixteen rooms in the hospital. I do not know what Dr. Lueders was making at this time. He had a very good practice. He told me he was making money, but never said just how much.

Cross-examination.

(By Mr. LANGHORNE.)

I identify my signature to the letter handed me. I wrote that letter.

Thereupon said letter is received in evidence by the Court and marked as Defendant's Exhibit "A."

Q. In regard to the payments for lumber made to Mr. Veness. Was that for lumber used to fix the old building up into a hospital?

A. I do not know anything about the remodeling of the hospital into a hotel. I was not there. These payments for lumber were made long before Miss Everitt came to Winlock.

**[Testimony of J. W. Phillips, for the Government
(Recalled).]**

J. W. PHILLIPS, being recalled, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

I identify my signature to the letter handed me, I mailed the original to the defendant.

Mr. RIDDELL.—We offer it in evidence as Plaintiff's Exhibit 14. [35]

The COURT.—It will be admitted as Plaintiff's Exhibit 14.

**[Testimony of Dr. O. N. Sullivan, for the
Government.]**

Dr. O. N. SULLIVAN, a witness called for and on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

I live at Aberdeen. I know defendant Lueders. In 1909 or 1910 I had a conversation with him in Aberdeen about the St. James Hotel property in Winlock. He told me he had rented it and was getting one hundred dollars a month for it.

**[Testimony of William S. Swaggart, for the
Government.]**

WILLIAM S. SWAGGART, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

(Testimony of William S. Swaggart.)

Direct Examination.

(By Mr. RIDDELL.)

My name is William S. Swaggart. I am proprietor of the Country Club located just out of Portland. I know the defendant. I have had some transactions with him with reference to the St. James Hotel property in Winlock. I had a friend who went to Winlock and secured a lease to the St. James Hotel and I financed it. The name of the party was C. E. Green. Afterwards I made an arrangement to lease the hotel myself and got a five-year lease. I made the arrangement with Dr. Lueders and Miss Everitt.

Q. With whom were all of your transactions except the signing of the papers?

A. With Miss Everitt.

Q. The signing of the papers was by whom?

A. Miss Everitt signed the papers. [36]

Q. With whom were your verbal transactions?

A. Dr. Lueders.

Cross-examination.

(By Mr. LANGHORNE.)

When the transaction with reference to the lease of the hotel was closed up Dr. Lueders and Miss Everitt were together.

Redirect Examination.

(By Mr. RIDDELL.)

Q. Did you ever have any other negotiations about the hotel with Dr. Leuders that were not in her presence?

A. None whatever that I know of. That was the

(Testimony of A. W. Shelly.)

only time. We arranged the lease and he sent it from Aberdeen to sign, or she sent it to me, rather; her name was signed to it.

[Testimony of A. W. Shelly, for the Government.]

A. W. SHELLY, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is A. W. Shelly. I live at Moclips. I run a drug store down there. I know the defendant. He has visited with me. I became acquainted with him about 1909, in October or November. When he visited me there was a lady with him, I took to be his wife. He introduced her as his wife; that is all I know. Some time during his visit, if I remember rightly, he said he had a hotel or hospital in Winlock—at one time a hospital but had turned it into a hotel. He talked of it as his hotel or hospital. I don't know whether he came right out and [37] said it was his own or not, but to the best of my recollection he talked about his hotel; that is all I know. He referred to it as his hotel. I do not remember whether anyone else was present.

Cross-examination.

I do not have any distinct recollection as to the date of this conversation. I think it was in 1909. I am not certain.

**[Testimony of Mrs. Nellie Shelly, for the
Government.]**

Mrs. NELLIE SHELLEY, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

Q. What is your full name?

A. Mrs. Nellie Shelly.

Q. You are the wife of Mr. Shelly, who just left the stand? A. Yes.

Q. You know Dr. Lueders? A. Yes, sir.

Q. Did you ever hear Dr. Lueders speak of the St. James Hotel property there in Winlock?

A. Yes, sir.

Q. Did you ever hear him refer to it as to whose it was?

A. Why, I understood it was his. He said he had a hotel.

Mr. LANGHORNE.—I moved to strike the answer out.

The COURT.—The answer may be stricken and the jury instructed to disregard it. You were asked to state what he said about it.

A. I heard him say he had a hotel up at Winlock.

Q. When did he say that? [38]

A. Oh, about three years ago, I think, down at Aberdeen.

Q. That was when he was living at Aberdeen?

A. Yes, sir. When he first came to Aberdeen.

Q. Do you remember when he came there?

(Testimony of Mrs. Nellie Shelly.)

A. Yes.

Q. When was it?

A. It was around Thanksgiving time. I know he took dinner with us.

Q. In what year? A. 1909, I guess it was.

Q. Do you remember how many times you heard him speak about it?

A. I just heard him speak about it in the drug-store, about he leased his hotel and somebody went away and left a lot of bills and he had to see about it; he was going up one time to see about it.

Q. What?

A. He was going up to Winlock to see about some parties that went out and left a lot of bills on it or something to that effect.

Cross-examination.

(By Mr. LANGHORNE.)

Q. At the time this conversation was had he was going to Winlock or going to Tacoma to see about collecting some bills that was due him from the parties that were running the hotel, wasn't he?

A. I understood it was at Winlock, he was going to Winlock.

Q. Anyway, at the time this conversation was had there was some trouble about it, wasn't it? [39]

A. Yes, sir, that is what I understood.

Q. There was some trouble from the renting of the hotel, wasn't it?

A. Yes, he was going to collect some rent, or they would not pay the rent or something.

Q. Now, what date did you say this was?

(Testimony of Mrs. Nellie Shelly.)

A. The conversation?

Q. Yes.

A. Oh, I could not say that, what date it was. I never noticed as to that.

Q. Did he say anything about furniture of the hotel?

A. I understood it was furnished; he spoke about it being furnished.

Q. He spoke about the furniture too, didn't he?

A. Yes, it was furnished.

Q. You never had any reason to pay any particular attention to this conversation, did you?

A. No, not much, only in his talk of course he drew my attention.

Q. Never made any impression upon you at the time, Mrs. Shelly?

A. No, I did not bother about it.

Q. Isn't it possible he spoke to you about being the owner of the furniture in the hotel—speaking of the hotel might it not be possible that he spoke to you of being the owner of the furniture and that you understood him as being the owner of the hotel?

A. Yes, I understood he was owner of the hotel; at least he said he was. [40]

Q. What did he say?

A. He said it was furnished and the people skipped out.

Q. Did he say to you "I am the owner of the hotel in Winlock," did he say that? A. Yes.

Q. Those identical words?

A. Yes, he said he owned the hotel—he owned the

(Testimony of Mrs. Nellie Shelly.)

hotel up at Winlock; it used to be a hospital.

Q. He says, "I am the owner." Did he use those words?

A. Why, I do not know; yes, I suppose he was the owner.

Q. You can recall the identical words years afterwards?

A. Why, I understood he was the owner of it; he spoke about that.

Q. I do not want what you understood, but I want to know did he say, use these words, "I am the owner"?

A. Yes, he said he owned the hotel; yes. He owned the hotel at Winlock.

Q. You just understood from the conversation he was the owner?

A. Why he owned the hotel at Winlock.

Q. Do you know that he went away shortly after that conversation?

A. He was to go away next morning, leave home.

Q. Miss Everett go with him?

A. I do not know anything about that.

Q. Was this in March, 1910, that this conversation occurred? A. It might have been about that time.

Q. Anyway, he went away the next morning?

A. Yes; he spoke about going away; he had to go away in the morning.

(Witness excused.) [41]

**[Testimony of Dr. N. E. Winnard, for the
Government.]**

Dr. N. E. WINNARD, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is N. E. Winnard. I am physician and surgeon. I live at Heppner, Oregon. I have been there since January 1st, 1905. Land around Heppner is used for farming and grazing. I know the defendant Lueders. I once owned property there and transferred some property through negotiations with him. I learned the St. James Hotel property was for trade for farm land and I looked the property over and Dr. Lueders came to Heppner and looked the ranch over and we made a trade, trading the ranch for the hotel property. I figured the St. James Hotel property at a value of eleven thousand dollars. In the exchange of the farm land for the hotel property, sixteen hundred dollars passed hands. The money came through B. E. Alvord, the agent. This was in May, 1911. I recognize the paper handed me. The signatures attached thereto are those of myself and my wife. It is a contract for the exchange. It was entered into between N. E. Winnard, party of the first part, and E. M. Everitt, party of the second part.

Mr. RIDDELL.—I will offer it in evidence. Any objection?

Mr. LANGHORNE.—Not the slightest.

(Testimony of Dr. N. E. Winnard.)

Thereupon said contract is received in evidence and marked as Plaintiff's Exhibit 15.

Q. By whom were all these negotiations conducted? A. Dr. Lueders. [42]

Cross-examination.

(By Mr. LANGHORNE.)

P. E. Alvord was the real estate agent. He negotiated the deal. I understood from Alvord who we were to deal with so far as the title of the property in Winlock was concerned. I understood that we were to deal with Miss Everitt so far as the title to the Winlock property was concerned. Dr. Lueders placed a value of eleven thousand dollars on the property in Winlock. I did not consider it worth that much. The true reason of making the trade was to get rid of the land in Oregon, as we were unable to carry the heavy mortgage of thirteen thousand dollars thereon; at least, that was one of the reasons. I suppose the Winlock property was worth about eight thousand dollars, although I never bought or sold any other property there and do not know anything about values at that place. I represented Huddleston in the trade. Dr. Lueders represented Miss Everitt.

Mr. RIDDELL.—That closes the Government's case, except two witnesses that will not be able to get here until tomorrow morning.

The COURT.—Mr. Langhorne, do you object to proceeding, letting that evidence be introduced out of order?

Mr. LANGHORNE.—No, we do not object to such

(Testimony of F. M. Harshberger.)

procedure. The Government can put the witnesses on the stand when they come in.

The COURT.—Then, without prejudice to the Government introducing the testimony when it arrives, you may open your case, Mr. Langhorne. [43]

[Testimony of F. M. Harshberger, for the Defendant, (Recalled).]

F. M. HARSHBERGER, being recalled as a witness in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

I recognize Defendant's Identification "B" as being the original petition in bankruptcy entitled In the Matter of Louis H. M. Williams, Bankrupt, No. 762, petition on the part of Dr. Lueders, E. Maude Everitt and John B. Sorenson, asking to have Williams, who was at that time lessee of the Winlock Hotel, declared bankrupt. The petition is dated March 12, 1910, and filed in this court March 14, 1910.

Which said petition was offered in evidence over the objection of Mr. Riddell, and marked Defendant's Exhibit "B."

[Testimony of A. W. Lueders, in His Own Behalf.]

A. W. LUEDERS, the defendant, being duly sworn, testified in his own behalf as follows:

Direct Examination.

(By Mr. LANGHORNE.)

My name is A. W. Lueders. I am a physician and surgeon. I am 46 years of age. I have lived in

(Testimony of A. W. Lueders.)

the State of Washington since 1900. I have been married twice. Was first married at Milwaukee, Wisconsin. First located at Walla Walla after coming to Washington. I lived there about three and one-half years. From there I moved to Tenino, residing there seven months. From Tenino I went to Winlock, Washington. I owned no real estate while at Walla Walla excepting an equity in a timber claim valued at about three hundred and fifty dollars. When I left Walla Walla my first wife went with me, but left me at Seattle and went east. [44] I don't know where she went. I afterwards learned that she was living in Milwaukee. I was afterwards served with a summons in a divorce suit. The paper recited that she was living in Milwaukee. When I went to Winlock I started a small hospital. I bought the real estate from Carl Buege. The purchase price was in the neighborhood of eight or nine hundred dollars. The building situated thereon was nothing more or less than a shack. It was not worth very much. I bought the land under contract. When I finished payments under the contract, I had Buege make the deed to Mrs. Reinhardt. The reason that I did so, I knew that in owning and disposing of property it would naturally require the signature of my wife, and her being in the east and I here, I did not think it best to take title in my own name. The Reinhardts are very good friends of mine and I thought that it would be a safe thing to take the deed in her name. Before having Buege make the deed to Mrs. Reinhardt I spoke to Mr. Veness about tak-

(Testimony of A. W. Lueders.)

ing deed in his own name. Some improvements were made on the property before the deed passed from Buege to Mrs. Reinhardt. The first improvement was to make the old building over so that it could be used for hospital purposes. The lumber bill probably amounted to five hundred dollars. Some three years after the hospital was remodeled and made over into a hotel. Miss Everitt came to Winlock in 1906. She was a nurse at that time. She had been there some five or six months when I sold her the property that I had bought from Buege. She paid me eight hundred dollars for the [45] same and assumed a lumber bill due to the J. A. Veness Lumber Company. The reason I sold her the property I wanted to leave town. After she bought the building which was at that time being used for hospital purposes, we made an arrangement whereby I was to look after the patients in the hospital and she would do the nursing and collect for her services and for hospital dues. When she first came there I paid her twenty-five dollars per month. Afterwards her salary was raised from time to time until it amounted to one hundred and twenty-five dollars per month. I spoke to Veness about loaning Miss Everitt three thousand dollars for the purpose of remodeling the hospital into a hotel. I told him at the time that Miss Everitt owned the property. After the hotel was finished Miss Everitt ran the same but I helped her. I owned the furniture in the hotel. Afterwards she leased the hotel to one Williams and I sold the furniture to him for the sum

(Testimony of A. W. Lueders.)

of twenty-five hundred dollars, of which amount only five hundred dollars was ever paid. Williams afterwards left the state. Miss Everitt and myself were married in January, 1912. We were married at Kalama, Cowlitz County, Washington. I went to Aberdeen in 1909. Miss Everitt went also. It was her duty to look after the office in my absence, attend to the compounding of drugs, and filling prescriptions and doing such other work as a nurse generally does in a doctor's office. When I left Winlock I did not owe any one. I owed no one when I sold the Winlock property to Miss Everitt in 1906 excepting a small bill to the Veness [46] Lumber Company which she assumed and afterwards paid and which was part of the consideration for the sale of the property. After I went to Aberdeen I paid Miss Everitt the sum of one hundred and fifty dollars per month for her services. Four months prior to the filing of my petition in bankruptcy, I owed a note for four hundred and fifty dollars to one Clancy. I owed Miss Everitt about four hundred and fifty dollars, and some other smaller bills. One John Forsgrim obtained a judgment for five thousand dollars against me by default, and that is what caused bankruptcy proceedings. I heard the statement of Mr. and Mrs. Shelly to the effect that I told them that I owned a hotel in Winlock. I did not tell them anything of the kind. I told them that I owned the furniture in a hotel in Winlock and that the party who had bought it did not pay for it and had left the state and I had to go down there and see what I could do to protect

(Testimony of A. W. Lueders.)

myself. When the proposition of Miss Everitt trading the Winlock property for lands in Oregon came up, I went to Oregon for her to look over that property. Some time prior thereto, Miss Everitt and I had an understanding that we were to be married as soon as I was legally free so to do. At the time I had Buege make the deed to Mrs. Reinhardt of the property I had purchased from him, I had no idea of defrauding any one. It was not made for the purpose of concealment. It was only made for the purpose that I have heretofore indicated.

Mr. RIDDELL.—The witnesses of whom I spoke yesterday are [47] now in court and I would like to put them on the stand.

The COURT.—All right, the defense will be interrupted long enough to allow you to put in the remainder of the testimony.

[Testimony of A. S. Hoonan, for the Government.]

A. S. HOONAN, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is A. S. Hoonan. I am now Assistant Cashier of the United States National Bank at Aberdeen, Washington. I was Teller in that bank on February 11, 1911. I identify my signature to identification No. 16.

Q. Tell the jury the circumstances of the execution of that paper.

Mr. LANGHORNE.—To that I object as abso-

(Testimony of A. S. Hoonan.)

lutely immaterial. The defendant is not charged here with secreting or disposing of any money, or attempting to conceal the same from his trustee. The only charge contained in the indictment is that he concealed real estate described therein. The testimony is therefore incompetent, irrelevant and immaterial.

The COURT.—The only charge in the indictment is the secreting of the particular real estate described. Unless the jury believes the transaction, about which this inquiry is made, concerns the matter charged in the indictment, you will disregard his testimony. (Discussion.)

The COURT.—The objection is overruled, and exception allowed.

Q. Tell the jury the circumstances under which that draft was purchased.

Mr. LANGHORNE.—I renew my objection.
[48]

The COURT.—Objection overruled.

A. As I recall it, Mr. Lueders came into the bank.

Q. That is this defendant?

A. Yes, sir, and requested currency, and I cannot tell you the exact amount he asked for, or if he asked for any amount, and that he was told by myself I was not in possession of that amount of currency. Whereupon he asked for a draft and the usual questions, of course, were asked about where he wanted to use it and in whose favor, and the draft was written out and sold to Mr. Lueders.

Q. And this is the draft? A. This is the draft.

(Testimony of Clyde L. Philliber.)

Mr. RIDDELL.—We will offer that in evidence as Plaintiff's Exhibit 16.

Mr. LANGHORNE.—Objected to for the reasons heretofore stated.

The COURT.—It will be admitted.

Thereupon said draft was marked as Plaintiff's Exhibit 16.

**[Testimony of Clyde L. Philliber, for the
Government.]**

CLYDE L. PHILLIBER, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

My name is Clyde L. Philliber. I am a clerk in the bank of Ladd & Tilton, Portland, Oregon. Have been in that position since July, 1907. That is my signature. (Referring to Plaintiff's Identification No. 17.) The other signature is that of Walter M. Cook, Assistant Cashier of the bank. I have but a faint recollection [49] of the circumstances pertaining to the execution of that paper. On February 13, 1911, Mr. Cook came to my window with a draft drawn from the United States National Bank at Aberdeen on the First National Bank of Portland, requesting that I give a certificate of deposit to E. M. Everitt. As I remember now, I was very busy at the time, and Mr. Cook, the Assistant Cashier, wrote the certificate and had me sign it, and he counter-signed it. I cannot say that I recognize Plaintiff's Exhibit 16, but it has my stamp upon it. It

(Testimony of Clyde L. Philliber.)

seems to have passed through my department in payment of this check here. (Plaintiff's Identification 17.)

Mr. LANGHORNE.—To all of this we object as incompetent, immaterial and irrelevant, and for the reasons given in opposition to the admission of the testimony of Mr. Hoonan.

The COURT.—Objection overruled and exception allowed.

Mr. RIDDELL.—We offer in evidence paper marked as Plaintiff's Identification 17.

Mr. LANGHORNE.—I object for the reasons heretofore stated.

The COURT.—It will be admitted.

**[Testimony of A. W. Lueders, Recalled in His Own
Behalf.]**

A. W. LUEDERS, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. LANGHORNE.)

In regard to the Clancy note for four hundred and fifty dollars. That was contracted in February, 1911. I did not mean to testify that it has been contracted four full months prior to the filing of [50] petition in bankruptcy. I identify paper handed me as being certificate of marriage between myself and Miss Everitt. We were married on the 22d day of January, 1912.

Cross-examination.

(By Mr. RIDDELL.)

The only property I owned when in Walla Walla

(Testimony of A. W. Lueders.)

was an equity in a timber claim. I took up the timber claim, borrowed the money to pay for it, and when I speak of the equity I meant what I subsequently got out of it over and above what I had to pay back to the party I borrowed the money from. Yes, I bought the property in Winlock from Mr. Buege and paid him one hundred dollars down and the balance on long time installments. I met the payments with my own money. After all payments were made I took title in the name of Mrs. Reinhardt. Some time thereafter, I cannot remember the particular date, I sold the property to Miss Everitt. Before selling it to her I made some few improvements on it. The lumber bill amounted to four or five hundred dollars. Carpenter bill probably amounted to three hundred dollars. The total expense of remodeling was probably eight hundred dollars. Miss Everitt paid me eight hundred dollars and assumed the lumber bill; Miss Everitt came to Winlock in 1905 or 1906; in 1906, I think. When Miss Everitt first started in I paid her twenty-five dollars per month. Every three or four months I raised her twenty-five dollars. About one year thereafter, one hundred dollars a month. Miss Everitt was with me four years in Winlock before going to Aberdeen. We went to Aberdeen in October or [51] November, 1909. I went into bankruptcy on March 31, 1911. We came to Winlock in the year 1906 and I entered into bankruptcy in March, 1911. Mr. and Mrs. Shelly are friends of mine; that is, we have always been friendly. Yes,

(Testimony of A. W. Lueders.)

I stated on the stand yesterday that I had a satisfactory settlement with my wife. I paid her two thousand dollars. I borrowed the money from Miss Everitt. My former wife and myself had a satisfactory arrangement and she received that amount. Yes, I have a receipt for the two thousand dollars.

Mr. LANGHORNE.—(Interrupting.) I will offer it in evidence now, if your Honor pleases. It is in the form of certified copy of decree of divorce.

Mr. RIDDELL.—No objection.

Thereupon said decree of divorce is received in evidence and marked as Defendant's Exhibit "D."

At the time the decree of divorce was entered I did not own any real estate. I don't know why the decree of divorce mentions "both real and personal property." I presume as a matter of form. That is all I know about it. When I was in Aberdeen my practice varied considerably. I averaged about three hundred dollars a month. Probably about the same in Winlock. The money that was paid to my wife was paid with the twelve hundred and eight hundred dollar drafts heretofore spoken of by the Government's witnesses. It was Miss Everitt's money, the whole two thousand dollars was hers. I bought the original drafts for her. I never denied purchasing the drafts. I denied that I purchased them for myself and I deny that again. Yes, I remember having been summoned [52] on supplementary proceedings in the Forsgrim case down in Chehalis County before Judge Mason Erwin.

Q. Doctor, you were asked at that time, were you

(Testimony of A. W. Lueders.)

not, whether you had ever resided in Winlock?

A. Yes, sir.

Q. And you were asked about the property, "Have you ever accumulated any property there or ever owned any property there," and you answered you had owned some property there?

Mr. LANGHORNE.—We object to this line of examination on the ground of privilege and upon the further ground that it is not cross-examination; that it had no relevancy whatever to the issue now on trial.

The COURT.—Objection overruled and exception allowed.

A. Yes.

Q. And then, Doctor, weren't you asked this question and wasn't this your answer, "Did you ever own real estate there," and didn't you say "No, sir"?

Mr. LANGHORNE.—Objected to for the reason heretofore given.

The COURT.—Objection overruled.

A. I do not recollect. If you have got the evidence there it is probably so.

Q. And then were you not asked "Did you ever have any interest in any real estate there?" and didn't you say "No, sir"? A. I do not know.

Q. And then weren't you asked who owned the real estate upon which the hotel stood and didn't you answer "E. M. Everitt owned that property"?

A. Yes. [53]

Q. Now, you were under oath there, Doctor?

A. I presume so.

(Testimony of A. W. Lueders.)

Q. Now, tell the jury why you have sworn in this case that you did own an interest in certain real estate in Winlock and why on that occasion you swore you did not.

A. Well, if I did that I probably thought I was being asked the question "Did I own it," to which I can consistently and truthfully *said* "No." I say that to-day.

Q. Didn't I ask you a little while ago whether at the time you had paid Buege for this property and it stood in the name of Mrs. Reinhardt if you did not own it then. Don't you remember my asking you that a little while ago and don't you remember saying that you did?

A. I do not remember now. Possibly. I don't think I fully understand you.

Q. Why, Doctor, on the occasion down in the Superior Court in Chehalis County, when you were up on supplementary proceedings there and you were asked, "Did you ever have any interest in real estate there," why did you say "No, sir"?

A. I do not know as I did say it. If I did that is the way I took it and construed it, as having any interest. I had no interest in it any more than the furniture, that is all.

Q. At the time this property stood in the name of Mrs. Reinhardt you owned it, didn't you?

A. Yes.

Q. Then when they used this language, "Did you ever have any interest in any real estate there," you understood that language to mean, "Have you any

(Testimony of A. W. Lueders.)

interest in any now"? [54]

A. Possibly I did; yes.

Q. And weren't you asked at that time, "Do you recall the circumstances of buying a twelve hundred dollar draft February 8th in the name of E. M. Everitt"? and didn't you answer, "I bought no such draft as that"? A. Yes.

Q. And weren't you asked, "You swear you never bought such a draft as that"? and you said, "No, sir"? A. Yes, that is what I said.

Q. And they asked you, "From the United States National Bank"? and you said—

A. Yes, sir. Yes, I testified that I once owned some furniture in a hotel at Winlock. The man I sold it to went bankrupt. I threw him into bankruptcy. After he was thrown into bankruptcy Mr. Benner, of Tacoma, was appointed trustee, and he sold the furniture to Miss Everitt. She paid eight hundred dollars for it. What was my reason for selling the St. James Hotel property to Miss Everitt? I know of no reason why I should not. I lost interest in it and wanted to get away, and sold out to her.

[Testimony of W. H. Kenoyer, for the Defendant.]

W. H. KENOYER, a witness called for and on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

My name is W. H. Kenoyer. I live at Chehalis, Washington. I have lived in Lewis County since 1888, and have been continuously in the real estate and insurance business. I once lived at Winlock. I

(Testimony of W. H. Kenoyer.)

am well acquainted with real [55] estate values in that town, and in other parts of the county. I know the St. James Hotel property. Its market value has never been in excess of three thousand dollars. That was its highest market value during the whole of the year 1911. I know the reputation of Dr. Lueders for honesty and integrity while I lived in Winlock. It was good.

[Testimony of George P. Wall, for the Defendant.]

GEORGE P. WALL, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

My name is George P. Wall. I reside at Winlock, Washington. I have resided there since 1890, excepting that during the year 1899 I lived in Portland. I am well acquainted with real estate values in Winlock. I know the St. James Hotel property. It never has had a market value in excess of thirty-five hundred dollars. I was acquainted with the reputation of Dr. Lueders for honesty and integrity while he lived in Winlock. It was good.

[Testimony of Mrs. Maude Lueders, for the Defendant.]

Mrs. MAUD LUEDERS, being duly sworn, testified as follows:

(By Mr. LANGHORNE.)

Direct Examination.

My name is Maude Lueders. I am the wife of the defendant. I came to this country from England. I came to Canada in 1904. I sailed from Liverpool

(Testimony of Mrs. Maude Lueders.)

and landed at Montreal. When I came to this country I brought fifteen hundred dollars with me. After I landed at Montreal I exchanged my English money for Canadian money. When I lived in England I followed nursing for an occupation. I worked [56] in the London Hospital. It is one of the largest hospitals in that city. I went to Winlock in April, 1906. Miss King was there when *sent* there. She left in December, 1906. When I first went to work for Dr. Lueders he paid me twenty-five dollars a month. I was working for him when he had Buege deed the property to Mrs. Reinhardt. Some time after I went there, Dr. Lueders complained a great deal about not desiring to live at Winlock and wanted to sell out. I thought I could run the hospital to advantage and so I offered to buy and did afterwards buy it from him. At that time there was no affection between Dr. Lueders and myself whatever. The transaction was a purely business transaction. Some time after purchasing the property, I thought I would remodel it over into a hotel as there were no good hotels in Winlock. I asked Dr. Lueders where I might borrow the money to make the necessary changes, and he told me that Mr. Veness might make the loan. I did not know Mr. Veness very well, so I asked Dr. Lueders to speak to him for me concerning the proposed loan. Afterwards I also talked with Mr. Veness myself. He said he would let me have the money. I paid Dr. Lueders eight hundred dollars for the property and assumed the bill for lumber that he owed Mr.

(Testimony of Mrs. Maude Lueders.)

Veness when he first remodeled the old building into a hospital. I was not living at Winlock when the hospital building was erected. Dr. Lueders and I were married January 22, 1912.

Cross-examination.

(By Mr. RIDDELL.) [57]

I paid eight hundred dollars to Dr. Lueders. I also assumed the lumber bill. I think the lumber bill amounted to three hundred dollars. I paid the lumber bill out of the three thousand dollars I borrowed from Mr. Veness. I have repaid the loan that Mr. Veness made. I had no conversation with anyone about purchasing the property from Dr. Lueders. I purchased it in the exercise of my own judgment. Yes, I am a party to the civil suit of James M. Phillips, as trustee in bankruptcy, against A. W. Lueders and E. Maude Everitt. I know J. E. McGraw, a notary public, with offices in the Pioneer Building, Seattle, Washington. I signed a paper before him one day. Yes, that is the paper you handed me. (Herewith witness reads from the answer.) As to whether the statements contained therein are correct, I do not know. It is all legal phraseology and I don't quite understand it, but as near as I can understand it, it is correct, yes. Mr. Langhorne is our attorney. He sent us over this answer and I signed it. Did I buy this property from Dr. Lueders? Well, Mr. Agnew, my attorney down at Aberdeen told me I had not bought it from Dr. Lueders, even if I had paid him the money; that the party the deed came from was the party I bought it from. I

(Testimony of Mrs. Maude Lueders.)

don't know why the answer in the civil case says Dr. Lueders sold the contract to some third party. I thought the paper meant—well—I don't know what it does mean. I did not use all of the three thousand dollar loan in remodeling the hospital into a hotel. I had about fifteen hundred dollars left after finishing the work thereon. [58] As to my experience in the London Hospital. I worked therein for several months. I worked in other hospitals besides the London Hospital. My mother gave me the fifteen hundred dollars that I brought to this country with me. I was examined before the Referee in Bankruptcy. I didn't tell them how much money I had when I came to this country. Mr. Agnew, my attorney, told me it was none of their business, and I didn't volunteer the information. I did not think they were concerned about it. When I bought the property in Winlock from Dr. Lueders there was no affection between us. When I was examined before the trustee in bankruptcy I did say I bought the Winlock property from some people in Portland. I also testified that I bought it with my own money. I meant that I got the deed from parties in Portland and my attorney told me that was the party from whom it was purchased.

Mr. RIDDELL.—I now offer in evidence a certified copy of the complaint and answer in the case of J. M. Phillips, as trustee, vs. A. W. Lueders and E. Maude Everitt.

Whereupon same is admitted in evidence and marked Plaintiff's Exhibit 18.

Rebuttal Testimony.**[Testimony of J. A. Cross, for the Government (in Rebuttal).]**

J. A. CROSS, a witness called for and on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. RIDDELL.)

Q. What is your name? A. J. A. Cross.

Q. What is your business? [59]

A. Court Reporter.

Q. Where? A. Aberdeen, Washington.

Q. Do you know the defendant? A. I do.

Q. Did you ever see him and know whether or not he testified in supplementary proceedings before Judge Mason Erwin? A. He did.

Q. Were you present? A. I was.

Q. Did you take down the testimony?

A. I did.

Q. Where are your notes?

A. I have got them here.

Q. The testimony in the supplementary proceedings?

A. No, I could not locate those notes. I misunderstood your question.

Q. Did you look for them? A. Yes.

Q. And are unable to find them? A. Yes.

Q. I show you that paper and ask you if you know what it is.

A. This is the transcript of defendant's testimony in the supplementary proceedings of A. W. Lueders.

(Testimony of J. A. Cross.)

Q. In the case I just asked you about? A. Yes.

Q. You were present? A. I was.

Q. How did you get this transcript, who made it?

A. I did. [60]

Q. Is it correct? A. Yes.

Q. Can you testify to what Lueders said at that time from your memory? A. No.

Mr. LANGHORNE.—What was your answer?

A. I cannot.

Mr. RIDDELL.—Can you by refreshing your recollection from this transcript? A. Yes, sir.

Mr. LANGHORNE.—You have no independent recollection of what he testified to on that trial?

A. I have not.

Mr. LANGHORNE.—The only means you have of knowing is by reference to a transcript of your notes taken at the time? A. That is all.

Mr. LANGHORNE.—I object to the testimony as absolutely incompetent. The witness has no recollection whatever of what defendant testified to at that time.

The COURT.—Objection overruled. Exception allowed.

Mr. RIDDELL.—I will ask you to refresh your memory by referring to that transcript and state whether or not Dr. Lueders was asked whether he resided in Winlock, Washington.

Mr. LANGHORNE.—Will that refresh your recollection, or are you just testifying from the transcript? Does the transcript recall to your mind affirmatively now what he testified to? [61]

(Testimony of J. A. Cross.)

A. No.

Mr. LANGHORNE.—We renew our objection.

The COURT.—Do you care to examine further on qualifications?

Mr. RIDDELL.—Looking at the transcript, after looking at the transcript are you able to swear to what the doctor testified?

A. Yes, I am able to testify that this is a transcript of the notes taken at the time, but by reference to the transcript, I cannot state that he testified to this; I haven't any recollection of him testifying to it.

Q. That is, you have not in your own mind?

A. No, sir.

Q. Do you know that is correct? A. I do.

Q. Do you swear that is correct?

A. I will swear that it is a correct transcript.

The COURT.—Objection overruled and exception allowed.

Mr. RIDDELL.—Did he state at that time—was he asked at that time whether he resided at Winlock, and he answered, “yes”? A. Yes.

Q. Was he asked if he ever owned any property, and he said, yes? A. He did.

Q. Was he asked at that time, “Did you ever own any real estate there?” and did he say, “No, sir”?

A. He did.

Q. Was he asked, “Did you ever have any interest in any real estate there?” and did he say, “No, sir”?

[62] A. He did.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 14, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."

[Order Settling Bill of Exceptions as Amended, etc.]

United States of America.

Western District of Washington,—ss.

Now, on this 27th day of January, 1913, the above cause coming on for hearing on the application and notice of the defendant to settle the Bill of Exceptions and the amendments proposed thereto in said cause, defendant appearing by his attorneys, Messrs. Hayden & Langhorne, the Government appearing by its attorney, B. W. Coiner, and it appearing to the Court that defendant's Bill of Exceptions was duly served on the United States District Attorney for the Western District of Washington in the time provided by law, and that thereafter, within the time provided by law, amendments were served thereto, and that said proposed Bill and the amendments have been settled by this Court, the Court allowing proposed amendments, one (1), two (2), three (3), four (4) and five (5), and disallowing amendment numbered six (6), as set forth in the motion to amend, and that both parties now consent to the signing, and settling of said Bill of Exceptions as amended, and it appearing that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things oc-

curing upon the trial, excepting the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions, and the clerk of this court is hereby ordered and instructed to attach the same thereto.

Thereupon, upon motion of Maurice A. Langhorne, attorney for said defendant, it is hereby ORDERED that said proposed Bill of Exceptions, as amended, be and the same is hereby settled as a true Bill of Exceptions in said cause; that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 27th day of January, 1913.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [63]

[**Stipulation Relative to Omission of Exhibits.**]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

A. W. LUEDERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WHEREAS, on the trial of this cause in the District Court of the United States for the Western District of Washington, Southern Division, resulting in a judgment and sentence now brought here for review, certain exhibits were introduced in evidence which have heretofore been incorporated in and made a part of the Bill of Exceptions by the order of the Honorable Edward E. Cushman, Judge of the said District Court; and

WHEREAS, counsel for respective parties hereto deem that it is absolutely unnecessary for the proper disposition of the questions involved in this writ of error to have the said exhibits set out in extenso in the printed record;

NOW, THEREFORE, it is hereby stipulated and agreed by and between C. F. RIDDELL, Assistant U. S. District Attorney, and Elmer M. Hayden and M. A. Langhorne, attorneys for the defendant, that the transcript of the record sent up by the clerk of the District Court of the United States, for the Southern Division of the Western District of Wash-

ington, shall be printed as sent up, except that the said exhibits, and all of them, may be omitted from the Bill of Exceptions as it shall appear in the printed record, and that there shall be substituted in lieu thereof this stipulation, with the summary of the contents of the said exhibits hereinafter contained, specifying in each case the pages of the transcript record where said exhibit appears; and it is further stipulated that the said Bill of Exceptions so modified by this stipulation shall be printed as the Bill of Exceptions and appear as such in the printed record.

It is further stipulated that the said exhibits, if set out at length, would disclose the following facts respectively:

1. Plaintiff's Exhibit No. 1 [Typewritten Record, p. 64]. In the matter of A. W. Lueders, bankrupt. Petition of A. W. Lueders, of Aberdeen, Chelalis County, Washington, for adjudication as voluntary bankrupt; acknowledged at Aberdeen before Walter I. Agnew, Notary Public for the State of Washington, March 29, 1911.

2. Plaintiff's Exhibit No. 2 [Typewritten Record, p. 72]. In the Matter of A. W. Lueders, bankrupt. Order of reference to J. E. Stewart, Referee in Bankruptcy, dated March 31, 1911. Signed R. M. Hopkins, clerk, by Samuel D. Bridges, deputy. Enter, George Donworth, Judge.

3. Plaintiff's Exhibit 3 [Typewritten Record, p. 75]. In the matter of A. W. Lueders, bankrupt. Order of adjudication of A. W. Lueders as a voluntary bankrupt. Dated March 31, 1911. Signed R.

M. Hopkins, clerk, by Samuel D. Bridges, deputy. Enter, George Donworth, Judge.

4. Plaintiff's Exhibit No. 4 [Typewritten Record, p. 77]. In the matter of A. W. Lueders, bankrupt. Appointment of J. M. Phillips, as trustee in said bankruptcy. His bond fixed at \$1,000. Dated February 23rd, 1912. Signed "J. E. Stewart, Referee in Bankruptcy."

5. Plaintiff's Exhibit 5 [Typewritten Record, p. 79]. In the matter of A. W. Lueders, bankrupt. Acceptance of trusteeship by J. M. Phillips, dated Feb. 27th, 1912.

6. Plaintiff's Exhibit 6 [Typewritten Record, p. 80]. In the matter of A. W. Lueders, bankrupt. Bond of J. M. Phillips as trustee in said bankruptcy in the sum of \$1,000, dated Feb. 27, 1912. G. E. Chamberlain and A. G. McIntyre sureties. Justification of the said sureties before R. E. Taggart, Notary Public for the State of Washington residing at Aberdeen, Feb. 27, 1912.

7. Plaintiff's Exhibit No. 7 [Typewritten Record, p. 83]. In the matter of A. W. Lueders, bankrupt. Approval of trustee's bond by J. E. Stewart, Referee in Bankruptcy, dated Feb. 27, 1912.

8. Plaintiff's Exhibit No. 8 [Typewritten Record, p. 85]. Warranty deed from Carl Buege and wife to Nancy Reinhardt, dated August 26, 1907, consideration \$1.00. Grantors grant, bargain, sell, convey and confirm certain property in Winlock, Lewis County, Washington, known hereafter as the St. James Hotel property. Two witnesses. Signed by Carl Buege and Adele Buege, his wife. Ac-

knowledge before S. A. DeVaney, Aug. 26, 1907. Copy certified to by H. H. Swofford, auditor of Lewis County, Dec. 13, 1912.

9. Plaintiff's Exhibit No. 9 [Typewritten Record, p. 89]. Warranty deed from Mrs. Nancy Reinhardt to Maude E. Everitt, dated Sept. 19, 1907, consideration \$1.00, covering same property as that in Plaintiff's Exhibit No. 8. Two witnesses. Signed by Mrs. Nancy Reinhardt. Acknowledged before R. H. Dunn, notary public for the State of Oregon on Dec. 30, 1907. Copy certified to by H. H. Swofford, Dec. 13, 1912.

10. Plaintiff's Exhibit 10 [Typewritten Record, p. 93]. Quitclaim deed from L. W. Reinhardt to Maude E. Everitt, dated April 3, 1909, consideration \$1.00. Same property as in plaintiff's exhibit No. 8. Two witnesses. Signed by L. W. Reinhardt and acknowledged before E. C. Warren at Oak Grove, Clackamas County, Oregon, on April 3, 1909. Certified by H. H. Swofford, auditor of Lewis County, Dec. 13, 1912.

11. Plaintiff's Exhibit No. 11 [Typewritten Record, p. 97]. Warranty deed from Maude E. Everitt to J. B. Huddleston, dated May 22, 1911. Consideration \$100.00. Same property as in plaintiff's exhibit No. 8. Two witnesses. Signed by Maude Everitt. Acknowledged May 22, 1911, before S. K. Bowes, Notary Public for Washington at Aberdeen. Certified to by H. H. Swofford, auditor Lewis County, Dec. 13, 1912.

12. Plaintiff's Exhibit No. 12 [Typewritten Record, p. 102]. Warranty deed from N. E. Winnard

and wife to Maude E. Everitt, dated May 6, 1912. Consideration \$10.00 and other valuable considerations. Covers certain property in Morrow County, Oregon. Two witnesses. Signed by N. A. Winnard and Charlotte L. Winnard. Acknowledged May 6, 1911, before C. E. Woodson, Notary Public for Oregon. Certified to by W. O. Hill, county clerk for Morrow County, Oregon, Dec. 2, 1912.

13. Plaintiff's Exhibit No. 13 [Typewritten Record, p. 105]. Warranty deed from J. B. Huddleston to Maude E. Everitt, dated May 5, 1911. Consideration \$10.00 and other valuable consideration, conveying certain property in Morrow County, Oregon, subject to mortgage in favor of J. R. Nunamaker on which there was \$5,000 due. Also subject to mortgage in favor of A. K. Higgs on which there was \$8,000.00 due, which mortgages the grantee assumed and agreed to pay. Two witnesses. Signed by J. B. Huddleston. Acknowledged before C. E. Woodson, Notary Public for Oregon, and certified to by W. O. Hill, county clerk for Morrow County, Oregon, on Dec. 12, 1912.

14. Plaintiff's Exhibit No. 14 [Typewritten Record, p. 108]. Letter of J. M. Phillips dated Apr. 30, 1912, prior to indictment and suit mentioned in Exhibit 18, to Dr. A. W. Lueders, as follows:

“Dear Sir:—I have recently been appointed by J. E. Stewart, Referee in Bankruptcy, as Trustee of the estate of A. W. Lueders, bankrupt, and have qualified.

This letter is a demand on you for any assets

you possess which should be turned over to me as such trustee.

Very truly yours,

(Signed) J. M. PHILLIPS, Trustee."

15. Plaintiff's Exhibit No. 15 [Typewritten Record, p. 109]. Agreement between N. E. Winnard and E. M. Everitt, dated May 27, 1911, covering the sale of the Oregon property to E. M. Everitt for the price of \$25,600, of which \$13,000 is covered by mortgages on the property which E. M. Everitt is to assume. Of the balance \$1,000 is to be paid in cash, \$600.00 two months from the date of the agreement and the balance \$11,000 to be paid by deed to the St. James Hotel property in Winlock, which is valued at \$11,000. Three witnesses. Signed by N. E. Winnard, Charlotte L. Winnard, E. M. Everitt. Confirmation by Charlotte L. Winnard. Two witnesses.

16. Plaintiff's Exhibit No. 16 [Typewritten Record, p. 112]. Draft of the United States National Bank of Aberdeen, Washington, on the First National Bank of Portland, Oregon, in favor of E. M. Everitt for \$1200.00, dated Feb. 11, 1911. Signed by A. S. Hoonan, teller. Endorsed on the back by E. M. Everitt.

17. Plaintiff's Exhibit No. 17 [Typewritten Record, p. 113]. Certificate of deposit of the Ladd & Tilton Bank, of Portland, Oregon, dated Feb. 13, 1911, in favor of E. M. Everitt for \$1200.00. Signed by E. C. Philliber, teller, and Walter W. Cook, Assistant Cashier. Endorsed on back by E. M. Everitt.

18. Plaintiff's Exhibit 18 [Typewritten Record, p. 115]. Summons and complaint in an action in the Superior Court of the State of Washington in and for King County, entitled "J. M. Phillips, as Trustee in Bankruptcy of A. W. Lueders, vs. A. W. Lueders and E. Maude Everitt," the action being one to restrain the conveyance of the Oregon property described in Plaintiff's Exhibits 12 and 13, pending the outcome of the suit and then to compel its conveyance to the plaintiff as trustee in bankruptcy, for the benefit of the creditors of A. W. Lueders.

19. Defendant's Exhibit "A" [Typewritten Record, p. 126]. Letter of Helen King to the defendant, A. W. Lueders, written to Aberdeen, Washington.

20. Defendant's Exhibit "B" [Typewritten Record, p. 128]. In the matter of the bankruptcy of Lewis H. M. Williams. Petition of Alfred W. Lueders, E. M. Everitt and John G. Sorenson for the adjudication of Lewis H. M. Williams of Winlock, Washington, as a bankrupt, Alfred W. Lueders claiming an indebtedness arising from four promissory notes, each dated Oct. 1, 1909, for \$500.00 each, and due three, six, nine and twelve months after date respectively. E. M. Everitt claiming an indebtedness in the sum of \$400.00 as past due rental of St. James Hotel at Winlock by virtue of the terms of leasehold under which the rent reserved was \$100.00 per month, payable in advance. John G. Sorenson claiming an indebtedness upon an assigned account in the sum of \$183.47. One witness.

Signed by Alfred W. Lueders, E. M. Everitt and John G. Sorenson. Acknowledged March 14, 1910, before J. B. Quinn, Notary Public at Aberdeen, Washington.

21. Defendant's Exhibit "C" [Typewritten Record, p. 132]. Certificate of the marriage of A. W. Lueders and E. M. Everitt at Kalama, Washington, dated Jan. 22, 1912. Two witnesses. Signed by the contracting parties and J. W. Frescoln of the Methodist Episcopal Church.

22. Defendant's Exhibit "D" [Typewritten Record, p. 133]. Files of the Superior Court of the State of Wisconsin for Milwaukee County in the case entitled "Valeska Lueders, plaintiff, vs. Alfred W. Lueders, defendant," being the findings of fact, conclusions of law and judgment of divorce. The findings and judgment orders that \$2,000 then on deposit in the Germania National Bank of Milwaukee to be a full and proper settlement in lieu of alimony and all other claims, and ordering the same to be paid to the plaintiff. The findings and conclusions are dated July 12, 1911, and signed by F. E. Eschwerley, Judge.

Dated this 19th day of March, 1913.

U. S. District Attorney.

C. F. RIDDELL,

Assistant U. S. Dist. Atty.

MAURICE A. LANGHORNE,

ELMER M. HAYDEN,

Attorneys for A. W. Lueders.

[Endorsed]: No. 2260. In the United States Circuit Court of Appeals, for the Ninth Circuit. A. W. Lueders, Plaintiff in Error, vs. United States of America, Defendant in Error. Stipulation. Filed Apr. 1, 1913. F. D. Monekton, Clerk.

*In the District Court of the United States for the
Western District of Washington, Southern
Division.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Petition for Writ of Error.

To the Honorable EDWARD E. CUSHMAN, Judge
of the District Court Aforesaid:

Comes now A. W. Lueders, the defendant herein,
by his attorneys, Elmer M. Hayden and Maurice A.
Langhorne, and respectfully shows:

That on the 18th day of December, A. D. 1912, a
jury theretofore duly empaneled, found a verdict
against your petitioner and in favor of the plaintiff
herein, and that upon said verdict a final judgment
was entered on the 30 day of December, 1912, against
your petitioner, defendant herein, in which judgment
and the proceedings had prior thereunto in this cause,
certain errors were committed to the prejudice of
this defendant, all of which will more in detail ap-
pear from the Assignment of Errors which is filed

with this petition.

WHEREFORE, your petitioner, feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, prays that a writ of error may issued in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of [139] and that transcript of the judgment, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, all in accordance with the laws of the United States in such cases made and provided.

ELMER M. HAYDEN,
MAURICE A. LANGHORNE,
Attorneys for the Petitioner.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."

Due service of the within and foregoing Petition by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 3d day of February, 1913.

B. W. COINER. [140]

*In the District Court of the United States for the
Western District of Washington, Southern
Division.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Assignments of Error.

Comes now the defendant in the above-entitled case, and in connection with his petition for Writ of Error makes the following assignments of error which he avers occurred upon the trial of the above-entitled cause, to wit:

I.

The Court erred upon the trial of said cause in admitting in evidence over defendant's objection the testimony of A. S. Hoonan with reference to the purchase by defendant in error of a certain draft in the sum of Twelve Hundred (\$1,200.00) Dollars, from the United States National Bank at Aberdeen, Washington, on February 11, 1911. The questions and answers put to and made by said witness in this connection being as follows:

(By Mr. RIDDELL, Assistant U. S. District Attorney.)

My name is A. S. Hoonan. I am now assistant cashier of the U. S. National Bank, at Aberdeen, Washington. I was teller in that bank on February

11, 1911. I identify my signature to identification No. 6. [141]

Q. Tell the jury the circumstances of the execution of that paper.

Mr. LANGHORNE.—To that I object as absolutely immaterial. The defendant is not charged here with secreting or disposing of any money, or attempting to conceal the same from his trustee. The only charge contained in the indictment is that he concealed real estate described thereon. The testimony is therefore incompetent, irrelevant and immaterial.

The COURT.—The only charge in the indictment is the secreting of the particular real estate described. Unless the jury believes that the transaction about which this inquiry is made concerns the matter charged in the indictment, you will disregard his testimony. The objection overruled and exception allowed.

Q. Tell the jury the circumstances under which that draft was purchased.

Mr. LANGHORNE.—I renew my objection.

The COURT.—Objection overruled.

A. As I recall it, Mr. Lueders came into the bank.

Q. That is this defendant?

A. Yes, sir, and requested currency. I cannot tell you the exact amount he asked for, or if he asked for any amount, and that he was told by myself that I was not in possession of that amount of currency, whereupon he asked for a draft and the usual questions, of course, were asked about where he wanted to use it and in whose favor, and the draft was writ-

ten out and sold to Mr. Lueders.

Q. And this is the draft? A. This is the draft.
[142]

Mr. RIDDELL.—We will offer that in evidence as Plaintiff's Exhibit 16.

Mr. LANGHORNE.—Objected to for the reasons heretofore stated.

The COURT.—It will be admitted.

II.

The Court further erred in permitting the witness, Clyde L. Philliber, a clerk in the bank of Ladd & Tilton, Portland, Oregon, to testify over the objection of defendant in error, to the circumstances attending the issuance of a certain certificate of deposit by that bank in favor of one E. M. Everitt. The testimony is as follows:

(By Mr. RIDDELL, Assistant U. S. Attorney.)

My name is Clyde L. Philliber. I am a clerk in the bank of Ladd & Tilton, Portland, Oregon. Have been in that position since July, 1907. That is my signature (referring to Plaintiff's Identification No. 17). The other signature is that of Walter M. Cook, Assistant Cashier of the bank. I have but a faint recollection of the circumstances pertaining to the execution of that paper. On February 13, 1911, Mr. Cook came to my window with a draft from the U. S. National Bank of Aberdeen on the First National Bank of Portland, and requested that I give a certificate of deposit to E. M. Everitt. As I remember now, I was very busy at the time and Mr. Cook, the Assistant Cashier, wrote the certificate and had me sign it and he countersigned it. I can-

not say that I recognize Plaintiff's Exhibit 16, but it has my stamp upon it. It seems to have passed through my department in payment of this check here (Plaintiff's Identification 17). [143]

Mr. LANGHORNE.—To all of this we object as incompetent, immaterial and irrelevant, and for the reasons given in opposition to the admission of the testimony of Mr. Hoonan.

The COURT.—Objection overruled and exception allowed.

Mr. RIDDELL.—We offer in evidence paper marked as Plaintiff's Identification No. 17.

Mr. LANGHORNE.—I object for the reasons heretofore stated.

The COURT.—It will be admitted.

III.

The Court further erred in permitting defendant in error to be cross-examined as to certain testimony alleged to have been given by him in a certain proceeding in Chehalis County, Washington, supplementary to execution, wherein one John Forsgren was plaintiff and A. W. Lueders, defendant in error herein, was defendant. The testimony related to what the defendant in error had testified to concerning his ownership of certain real estate in Winlock, Lewis County, Washington, in that proceeding. The questions and answers put to and made by said witness in this connection being as follows:

(By Mr. RIDDELL.)

. . . . Yes, I remember having been summoned on supplementary proceedings in the Forsgren case down in Chehalis County, before Judge Mason Irwin.

Q. Doctor, you were asked at that time, were you not, whether or not you ever resided at Winlock?

A. Yes, sir.

Q. And you were asked about the property: "Have you ever [144] accumulated any property there or ever owned any property there?" and you answered you had owned some property there?

Mr. LANGHORNE.—I object to this line of examination on the ground of privilege and upon the further ground that it is not cross-examination; that it has no relevancy whatever to the issue now on trial.

The COURT.—Objection overruled and exception allowed.

A. Yes, sir.

Q. And then, Doctor, weren't you asked this question and wasn't this your answer: "Did you ever own real estate there?" and didn't you say, "No, sir"?

Mr. LANGHORNE.—Objected to for the reasons heretofore given.

The COURT.—Objection overruled.

A. I do not recollect. If you have got the evidence there, it is probably so.

Q. And then, were you not asked: "Did you ever have any interest in any real estate there?" and didn't you say, "No, sir"?

A. I do not know.

Q. And then weren't you asked who owned the real estate on which the hotel stood, and didn't you answer, "E. M. Everitt owns that property"?

A. Yes.

Q. Now, you were under oath there, Doctor?

A. I presume so.

Q. Now, tell the jury why you have sworn in this case that you did own an interest in certain real estate in Winlock, and why on that occasion you swore you did not.

A. Well, if I did that, I probably thought I was being [145] asked the question, "Did I own it," to which I can consistently and truthfully *said* "No." I say that to-day.

Q. Doctor, I asked you a little while ago whether, at the time you had paid Buege for this property and it stood in the name of Mrs. Reinhardt, if you did not own it then. Don't you remember my asking you that a little while ago, and don't you remember saying that you did?

A. I do not remember now. Possibly.

Q. Why, Doctor, on that occasion down in the Superior Court in Chehalis County, when you were up on supplementary proceedings and you were asked, "Did you ever have any interest in real estate there?" why did you say "No, sir"?

A. I do not know as I did say it. If I did, that is the way I took it and construed it as having any interest. I had no interest in it any more than the furniture. That is all.

Q. At the time this property stood in the name of Mrs. Reinhardt, you owned it, didn't you?

A. Yes.

Q. Then, when they used this language, "Did you ever have any interest in any real estate there?" you understood that language to mean, "Have you any interest in any now"? A. Possibly I did; yes.

Q. And weren't you asked at that time: "Do you

recall the circumstances of buying a twelve hundred dollar draft February 8th in the name of E. M. Everitt?" and didn't you answer, "I bought no such draft as that"? [146] A. Yes.

Q. And weren't you asked, "You swear you never bought such a draft as that?" and you said "No"?

A. Yes, that is what I said.

Q. And they asked you "from the U. S. National Bank?" and you said—

A. Yes, sir I testified that I only owned some furniture in a hotel in Winlock. The man I sold it to went bankrupt. I threw him into bankruptcy. After he was thrown into bankruptcy, Mr. Benner, of Tacoma, was appointed trustee and he sold the furniture to Miss Everitt. She paid eight hundred dollars for it.

IV.

The Court further erred in permitting the witness, J. A. Cross, to testify over defendant's objection as to what defendant in error testified to in a certain proceeding had and held in the Superior Court of Chehalis County, Washington, in aid of proceedings supplementary to execution in the case of John Forsgren, plaintiff, vs. A. W. Lueders, defendant. The testimony was introduced for the alleged purpose of impeaching the testimony of defendant in error given on the trial of this action. The questions and answers put to and made by said witness in this connection being as follows:

(By Mr. RIDDELL, Assistant U. S. Attorney.)

Q. What is your name? A. J. A. Cross.

Q. What is your business? A. Court Reporter.

Q. Where? A. Aberdeen, Washington.

Q. Do you know the defendant? A. I do.

Q. Did you ever see him or know whether or not he testified in supplementary proceedings before Judge Mason Irwin? A. He did.

Q. Were you present? A. I was.

Q. Did you take down the testimony? A. I did.

Q. Where are your notes?

A. I have got them here.

Q. The testimony in the supplementary proceedings?

A. No, I could not locate those notes. I misunderstood your question.

Q. Did you look for them? A. Yes.

Q. And are unable to find them? A. Yes.

Q. I show you that paper and ask you if you know what it is.

A. This is a transcript of the defendant's testimony in the supplementary proceedings of A. W. Lueders.

Q. In the case I just asked you about? A. Yes.

Q. You were present? A. I was.

Q. How did you get this transcript? Who made it? [148] A. I did.

Q. Is it correct? A. Yes.

Q. Can you testify to what Lueders said at that time from your memory? A. No.

Mr. LANGHORNE.—What was your answer?

A. I cannot.

Mr. RIDDELL.—Can you by refreshing your recollections from this transcript? A. Yes, sir.

Mr. LANGHORNE.—You have no independent

recollection of what he testified to on that trial?

A. I have not.

Mr. LANGHORNE.—The only means you have of knowing is by reference to a transcript of your notes taken at the time? A. That is all.

Mr. LANGHORNE.—I object to the testimony as absolutely incompetent. The witness has no recollection whatever of what defendant testified to at that time.

The COURT.—Objection overruled and exception allowed.

Mr. RIDDELL.—I will ask you to refresh your memory by referring to that transcript and stating whether or not Dr. Lueders was asked whether he resided in Winlock, Washington?

Mr. LANGHORNE.—Will that refresh your recollection or are you just testifying from the transcript? Does the transcript recall to your mind affirmatively now what he testified to? [149]

A. No.

Mr. LANGHORNE.—We renew our objection.

The COURT.—Do you care to examine further on qualifications?

Mr. RIDDELL.—After looking at the transcript, are you able to swear to what the doctor testified?

A. I am able to testify that this is a transcript of the notes taken at the time, but by reference to this transcript I cannot state that he testified to this. I haven't any recollection of him testifying to it.

Q. That is, you have not in your own mind?

A. No, sir.

Q. Do you know that is correct? A. I do.

Q. Do you swear that it is correct?

A. I will swear that it is a correct transcript.

The COURT.—Objection overruled and exception allowed.

Mr. RIDDELL.—Did he state at that time—was he asked at that time whether he resided at Winlock and he answered “yes”? A. Yes.

Q. Was he asked if he ever owned any property and he stated “yes”? A. He did.

Q. Was he asked at that time, “Did you ever own any real estate there”? and he said, “No, sir”?

A. He did.

Q. Was he asked, “Did you ever have any interest in any real estate there”? and did he say “No, sir”?

A. He did. [150]

V.

The Court further erred in denying defendant's motion to set aside the verdict and granting a new trial on the ground that the testimony failed to show that defendant in error was guilty of the crime charged in the indictment, or of any crime.

WHEREFORE, defendant in error prays that the judgment against him in said lower court be reversed and that a new trial be granted.

ELMER M. HAYDEN,

MAURICE A. LANGHORNE,

Attorneys for Defendant, 408 Perkins Bldg., Tacoma, Washington.

[Endorsed]: “Filed U. S. District Court, Western District of Washington. Feb. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.”
[151]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Order [Allowing Writ of Error, etc.].

Now, on this third day of February, 1913, came the defendant A. W. Lueders, by his attorneys, Elmer M. Hayden and Maurice A. Langhorne, and filed herein and presented to the Court, his petition praying for the allowance of a Writ of Error, and also an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment was rendered, after being duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises; and the Court being duly advised in all the premises;

IT IS ORDERED that the said Writ of Error be and the same is hereby allowed, and the said writ shall operate as a supersedeas if filed within 60 days from December 30th, 1912.

Done in open court this third day of February, 1913.

EDWARD E. CUSHMAN,

Judge. [152]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [153]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1192.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. LUEDERS,

Defendant.

Bail Bond.

United States of America,
Western District of Washington,—ss.

We, A. W. Lueders, defendant above named as principal, and Harry C. Beck and Ida Beck, his wife, and E. A. C. Smith and Leah L. Smith, his wife, as sureties, do hereby jointly and severally acknowledge ourselves indebted to the United States of America in the sum of TWO THOUSAND and no/100 (\$2000.00) Dollars, lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements upon this condition:

WHEREAS, the said A. W. Lueders, defendant

in the above-entitled cause has given notice of his intention to cause his recent conviction and sentence in the above-entitled action, and the entire cause to be reviewed by a Writ of Error from the judgment of the District Court of the United States, for the Western District of Washington, Southern Division, in the above-entitled cause, in the United States [154] Circuit Court of Appeals for the Ninth Circuit.

Now, if the said A. W. Lueders shall appear and surrender himself in the District Court of the United States, for the Western District of Washington, Southern Division, on and after the filing in the said District Court of the mandate of the said Circuit Court of Appeals and from time to time thereafter, as he may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, and not depart from the said District Court without leave thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

WITNESS our hands and seals this 30th day of December, A. D. 1912.

A. W. LUEDERS.

E. A. C. SMITH.

LEAH L. SMITH.

HARRY C. BECK,

IDA BECK.

Taken and approved this 2d day of Jan. 1913.

EDWARD E. CUSHMAN,

District Judge. [155]

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Deputy United States clerk for the Western District of Washington, do hereby certify that on the 30th day of December, 1912, personally appeared before me A. W. Lueders and E. A. C. Smith, and Leah L. Smith, his wife, to me known to be the parties named in and who executed the foregoing instrument, as principal and sureties respectively, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] F. M. HARSHBERGER,
Deputy Clerk, U. S. District Court, Western District
of Washington.

United States of America,
Western District of Washington,—ss.

I, Wilbra Coleman, United States Commissioner residing at Sedro Wooley, Skagit County, in the State of Washington, do hereby certify that on the 30th day of December, 1912, personally appeared before me Harry Beck and Ida Beck, his wife, to me known to be the persons named in and who executed the foregoing instrument as sureties thereto, and acknowledged to me that they signed and sealed [156] the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 31st day of December, 1912.

[Seal]

WILBRA COLEMAN,
United States Commissioner.

United States of America,
Western District of Washington,—ss.

E. A. C. Smith and Leah L. Smith, his wife, of 701 L. Street, in the city of Tacoma, in said District, sureties on the foregoing recognizance or bond, make oath and say, that the community consisting of E. A. C. Smith and Leah L. Smith, husband and wife, is a freeholder in the county of Pierce, Washington, and that it is worth the sum FIVE THOUSAND (\$5,000) DOLLARS, over and above its just debts and liabilities in property subject to execution and sale, and that its property consists of the south half of section 17 (S. $\frac{1}{2}$ sec. 17), township seven (7), range twenty-nine (29), W. M.

E. A. C. SMITH.

LEAH L. SMITH.

Subscribed and sworn to before me this 30th day of December, 1912.

[Seal]

F. M. HARSHBERGER,
Deputy Clerk, U. S. District Court, Western District of Washington. [157]

United States of America,
Western District of Washington,—ss.

Harry Beck and Ida Beck, his wife, of the city of Sedro Wooley, Skagit County, Washington, in said Western District of Washington, sureties on the foregoing recognizance or bond, make oath and say, that the community consisting of Harry Beck and Ida

Beck, his wife, is a freeholder of the county of Skagit, and that it is worth the sum of FIVE THOUSAND (\$5,000) DOLLARS, over and above its just debts and liabilities in property subject to execution and sale, and that its property consists of the west 24 rods of the east half of the southeast quarter (W. 24 rods E. $\frac{1}{2}$ of SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), less a strip ten (10) rods by thirty-two (32) rods in the southeast corner thereof, and the west half of the southeast quarter (W. $\frac{1}{2}$ SE. $\frac{1}{4}$) of the northwest quarter (NW. $\frac{1}{4}$), all in section 23, township 35, range 4 east, W. M.

HARRY C. BECK.

IDA BECK.

Subscribed and sworn to before me 31st day of December, 1912.

[Seal]

WILBRA COLEMAN,

United States Commissioner for the Western District of Washington.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 2, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [158]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing pages, numbered 1 to 158, inclusive, to contain a true and correct copy of the transcript of the record in the case of United

States of America, plaintiff and defendant in error, versus A. W. Lueders, defendant and plaintiff in error, as the originals thereof appear on file in this court at Tacoma, in said District.

And I further transmit herewith the Original Citation and Writ of Error, in said cause.

And I do further certify that the clerk's fees for preparing and certifying said transcript on appeal amounts to \$61.50, which has been paid in full by the attorneys for plaintiff in error.

Attest my official signature and the seal of the said Court, at Tacoma, in said District, this 26th day of March, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy.

[Endorsed]: No. 2260. United States Circuit Court of Appeals for the Ninth Circuit. A. W. Lueders, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received March 29, 1913.

F. D. MONCKTON,

Clerk.

Filed April 1, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[Writ of Error (Original).]

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States of America, for the Western District of Washington, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, plaintiff, and A. W. Lueders, defendant, a manifest error hath happened to the great damage of the said A. W. Lueders, defendant, as by his complaint appears, we being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California in said circuit on the fifth day of March next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 3d day of February, A. D. 1913, and 137th year of the Independence of the United States of America.

Issued at the office in Tacoma, Washington, in said circuit, with the seal of the District Court for the Western District of Washington and dated as aforesaid.

[Seal] FRANK L. CROSBY,
Clerk of District Court of the United States, Western District of Washington.

By F. M. Harshberger,
Deputy.

[Endorsed]: No. 1192. In the District Court of the United States for the Western District of Washington, Tacoma. A. W. Lueders, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed U. S. District Court, Western District of Washington. Feb. 3, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy.

No. 2260. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error. Received Mar. 29, 1913. F. D. Monckton, Clerk. Filed Apr. 1, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

A. W. LUEDERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation [on Writ of Error (Original)].

The United States of America,

Ninth Judicial Circuit,—ss.

The President of the United States, to the United
States of America and to Its Attorneys, B. W.
Coiner and C. F. Riddell, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, in said Circuit, within thirty days from the date of this citation, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein A. W. Lueders is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, District Judge of the United States at Tacoma, within said circuit, this 3d day of February, A. D. 1913, and of the Independence of the United States of America, the 137th.

[Seal]

EDWARD E. CUSHMAN,
U. S. District Judge.

Office of United States Marshal,
Western District of Washington,—ss.

I hereby certify and return that I served the within Citation on the within named United States Attorney, for the Western District of Washington, by handing to and leaving a certified copy thereof with B. W. Coiner, as United States Attorney.

Done at Tacoma this 3d day of February, 1913.

JOSEPH R. H. JACOBY,
United States Marshal.
By Ira S. Davisson,
Chief Deputy.

Marshal's fees—\$2.00.

I hereby accept due personal service of this citation on behalf of the United States of America, defendant in error herein, this 3 day of February, 1913.

B. W. COINER,
Attorney for Defendants in Error.

[Endorsed]: Original. Served Feb. 3, 1913. No. 1192. In the United States District Court, Western District of Washington. Filed U. S. District Court, Western District of Washington. Feb. 4, 1913. Frank L. Crosby, Clerk. U. S. Marshal's Criminal Docket No. 4220.

No. 2260. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Writ of Error. Received Mar. 29, 1913. F. D. Monckton, Clerk. Filed Apr. 1, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

*In the United States Circuit Court of Appeals, for
the Ninth Judicial Circuit.*

A. W. LUEDERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to File Record.

For good cause shown,

IT IS NOW ORDERED that the time within which the return on the Writ of Error herein shall be filed in this court, be, and the same is hereby extending to and including the 5th day of April, A. D. 1913.

Dated February 20, 1913.

EDWARD E. CUSHMAN,

United States District Judge, Western District of
Washington.

[Endorsed]: No. 1192. In the Circuit Court of the United States of Appeals. A. W. Lueders, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time for Record. Filed U. S. District Court, Western District of Washington. Mar. 11, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy. G. O. B. 149.

No. 2260. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Apr. 5, 1913, to File Record Thereof and to Docket Case. Received Mar. 29, 1913. F. D. Monckton, Clerk. Filed Apr. 1, 1913. F. D. Monckton, Clerk.

No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. W. LUEDERS,
Plaintiff in Error,

—VS.—

UNITED STATES OF AMERICA,
Defendant in Error.

APPEAL FROM THE DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

On March 31, 1911, plaintiff in error, on his voluntary petition, was adjudicated to be a bankrupt, and on February 23, 1912, one J. M. Phillips was appointed as Trustee in Bankruptcy and qualified

on February 27, 1912. On September 20, 1912, the grand jury for the western district of Washington returned an indictment against plaintiff in error charging him with wilfully concealing certain of his assets from his trustee in bankruptcy, to wit, certain real estate situated in Morrow county, state of Oregon, and described as the east half of north-east quarter of section 27; the north half of section 26; the northeast quarter of southwest quarter of section 26; the north half of southeast quarter of section 26; the southeast quarter of southeast quarter of section 26; the south half of section 25; the south half of north half of section 25; the north half of north half of section 36; the west half of north-east quarter of section 35, all in township 3, south of range 25 east of W. M., and the southwest quarter of northwest quarter and northwest quarter of southwest quarter of section 30, in township 3 south of range 26 east of W. M.

The salient facts surrounding and giving rise to the indictment may be summarized about as follows:

By occupation the appellant is a physician and surgeon, and was at all the times hereinafter mentioned engaged in the active practice of his profession. From 1905 to 1909 appellant resided in Winlock, Lewis County, Washington (Transcript, pp. 21-44). In 1905 he purchased of one Carl Buege, under contract of sale, certain real estate situated in the town of Winlock (Transcript, pp. 21-22). The appellant completed his payments to Buege for

the land in the year 1907 (Transcript, page 22), and thereby became entitled to receive a deed to the land in question. At appellant's request Buege made deed to one Nancy Reinhardt, as grantee. Mrs. Reinhardt paid no consideration whatever for the deed and held the title in trust for appellant. The reason assigned by appellant why he had the deed taken in the name of Mrs. Reinhardt was due to the fact that he was a married man; that his wife had left him and that if he took the title in his own name he could not convey without her signature, and for these reasons he did not desire to take the title in his own name. Some time after he contracted to purchase the property from Buege he commenced the erection of a small hospital building on the land. In April of 1906 one E. Maude Everitt, who afterwards intermarried with appellant, went to Winlock in the capacity of a professional nurse and entered appellant's employ. She was in his employ at the time Buege, at appellant's request, made the deed to Mrs. Reinhardt. On or about September 19, 1907, Miss Everitt purchased the property from Dr. Lueders, and Mrs. Reinhardt, at his request, made a deed to Miss Everitt to the same (Transcript, page 66). After purchasing this property Miss Everitt decided to remodel it over into a hotel, and for that purpose borrowed the sum of Three Thousand Dollars from J. A. Veness, of Winlock, giving him as security a mortgage deed on the property in question. Miss Everitt paid Dr. Lueders the sum of Eight Hundred Dollars for the real estate in question and also assumed

the payment to Mr. J. A. Veness of a bill for lumber that he had furnished to Dr. Lueders when the hospital building was erected (Transcript, page 55). In the year 1909 appellant removed from Winlock, Washington, to Aberdeen, Washington, Miss Everitt accompanying him in the capacity of a nurse and clerk (Transcript, page 44). At the time Dr. Lueders left Winlock he was absolutely free from debt. He owed no one. On July 12, 1911, his wife, Valeska Lueders, obtained a decree of divorce in the Superior Court of the state of Wisconsin, for Milwaukee County. Appellant paid her the sum of Two Thousand Dollars in full settlement of all her claims against him, which settlement was ratified in the decree referred to (Tr., page 70). While living at Aberdeen and practicing his profession, one John Forsgren brought action of malpractice against him and obtained judgment in the sum of Five Thousand Dollars by default, which judgment was the moving cause of the bankruptcy proceedings.

On May 22, 1911, Miss Everitt conveyed the property in Winlock which she had purchased from appellant to one J. B. Huddleston, receiving in exchange therefor deeds from N. E. Winnard, J. B. Huddleston and others, to the lands situated in Morrow county, Oregon, and which are described in the indictment. The lands in Morrow county, Oregon, so received in exchange for the Winlock property were incumbered to the extent of Thirteen Thousand Dollars. Miss Everitt and appellant intermarried

at Kalama, Cowlitz county, Washington, on January 22, 1912.

It was the contention of the Government, as disclosed by the Bill of Particulars which was required to be furnished (Tr., pp. 7 and 8), that plaintiff in error was the beneficial owner of the lands in Morrow county, Oregon, which are described in the indictment, and that he was guilty of wilfully concealing the same from his trustee in bankruptcy because he did not immediately deed the same to the trustee upon his appointment and qualification. The only proof whatever, showing or tending to show that appellant was the owner of the lands described in the indictment, consists of certain statements made by him at divers times to different parties that he was the owner of the Winlock property.

Upon the trial of the action in the lower court, the Government, over protests and objections of appellant, was permitted to introduce in evidence the testimony of A. S. Hoonan and Clyde L. Philliber (Tr., 45-48) relating to the withdrawal of certain moneys from the United States National Bank at Aberdeen at a time prior to the appointment of the trustee in bankruptcy, which testimony the plaintiff in error claims to have no relevancy whatsoever to the crime charged in the indictment and that the testimony of said named witnesses was designed to create a prejudice against the plaintiff in error, having a tendency to show that he might be guilty of an offense distinct and separate from the one at-

tempted to be charged in the indictment. The trial court also permitted the appellant to be interrogated on cross-examination as to what he had sworn concerning the ownership of the Winlock property in a proceeding in the Superior Court of Chehalis County supplemental to execution in the case of *Forsgren vs. Lueders*, and also permitted the Government, in rebuttal, to introduce in evidence the testimony given by plaintiff in error in that proceeding. The specific reasons for our objections and protests to this character of evidence can best be understood and considered by reference to our

ASSIGNMENTS OF ERROR.

Comes now the defendant in the above entitled case, and in connection with his petition for Writ of Error makes the following assignments of error which he avers occurred upon the trial of the above entitled cause, to-wit:

I.

The Court erred upon the trial of said cause in admitting in evidence, over defendant's objection, the testimony of A. S. Hoonan with reference to the purchase by defendant in error of a certain draft in the sum of Twelve Hundred (\$1,200.00) Dollars from the United States National Bank at Aberdeen, Washington, on February 11, 1911. The questions and answers put to and made by said witness in this connection being as follows:

(By MR. RIDDELL, Assistant U. S. District Attorney.)

“My name is A. S. Hoonan. I am now assistant cashier of the U. S. National Bank, at Aberdeen, Washington. I was teller in that bank on February 11, 1911. I identify my signature to identification No. 16.

Q. Tell the jury the circumstances of the execution of that paper.

MR. LANGHORNE: To that I object as absolutely immaterial. The defendant is not charged here with secreting or disposing of any money, or attempting to conceal the same from his trustee. The only charge contained in the indictment is that he concealed real estate described therein. The testimony is therefore incompetent, irrelevant and immaterial.

THE COURT: The only charge in the indictment is the secreting of the particular real estate described. Unless the jury believes that the transaction about which this inquiry is made concerns the matter charged in the indictment, you will disregard his testimony. The objection overruled and exception allowed.

Q. Tell the jury the circumstances under which that draft was purchased.

MR. LANGHORNE: I renew my objection.

THE COURT: Objection overruled.

A. As I recall it, Mr. Lueders came into the bank,

Q. That is the defendant?

A. Yes, sir, and requested currency. I cannot tell you the exact amount he asked for, or if he asked for any amount, and that he was told by myself that I was not in possession of that amount of currency, whereupon he asked for a draft and the usual questions, of course, were asked about where he wanted to use it and in whose favor, and the draft was written out and sold to Mr. Lueders.

Q. And this is the draft?

A. This is the draft.

MR. RIDDELL: We will offer that in evidence as Plaintiff's Exhibit 16.

MR. LANGHORNE: Objected to for the reasons heretofore stated.

THE COURT: It will be admitted.

II.

The Court further erred in permitting the witness, Clyde L. Philliber, a clerk in the bank of Ladd & Tilton, Portland, Oregon, to testify over the objection of defendant in error, to the circumstances attending the issuance of certain certificates of deposit by that bank in favor of one E. M. Everitt. The testimony is as follows: (By MR. RIDDELL, Assistant U. S. Attorney.)

My name is Clyde L. Philliber. I am a clerk in the bank of Ladd & Tilton, Portland, Oregon. Have been in that position since July, 1907. That is my signature (referring to Plaintiff's Identification No. 17). The other signature is

that of Walter M. Cook, Assistant Cashier of the bank. I have but a faint recollection of the circumstances pertaining to the execution of that paper. On February 13, 1911, Mr. Cook came to my window with a draft from the U. S. National Bank of Aberdeen on the First National Bank of Portland, and requested that I give a certificate of deposit to E. M. Everitt. As I remember now, I was very busy at the time and Mr. Cook, the assistant cashier, wrote the certificate and had me sign it and he counter-signed it. I cannot say that I recognize Plaintiff's Exhibit 16, but it has my stamp upon it. It seems to have passed through my department in payment of this check here. (Plaintiff's Identification 17.)

MR. LANGHORNE: To all of this we object as incompetent, immaterial and irrelevant, and for the reasons given in opposition to the admission of the testimony of Mr. Hoonan.

THE COURT: Objection overruled and exception allowed.

MR. RIDDELL: We offer in evidence paper marked as Plaintiff's Identification No. 17.

Mr. LANGHORNE: I object for the reasons heretofore stated.

THE COURT: It will be admitted.

III.

The Court further erred in permitting defendant in error to be cross-examined as to cer-

tain testimony alleged to have been given by him in a certain proceeding in Chehalis County, Washington, supplementary to execution, wherein one John Forsgren was plaintiff and A. W. Lueders, plaintiff in error herein, was defendant. The testimony related to what the plaintiff in error had testified to concerning his ownership of certain real estate in Winlock, Lewis County, Washington, in that proceeding. The questions and answers put to and made by said witness in this connection being as follows: (By MR. RIDDELL.)

* * * Yes, I remember having been summoned in supplementary proceedings in the Forsgren case down in Chehalis County, before Judge Mason Irwin.

Q. Doctor, you were asked at that time, were you not, whether or not you ever resided at Winlock?

A. Yes, sir.

Q. And you were asked about the property: "Have you ever accumulated any property there or ever owned any property there?" and you answered you had owned some property there?

MR. LANGHORNE: I object to this line of examination on the ground of privilege and upon the further ground that it is not cross-examination; that it has no relevancy whatever to the issue now on trial.

THE COURT: Objection overruled and exception allowed.

A. Yes, sir.

Q. And then, Doctor, weren't you asked this question and wasn't this your answer: "Did you ever own real estate there?" and didn't you say, "No, sir?"

MR. LANGHORNE: Objected to for the reasons heretofore given.

THE COURT: Objection overruled.

A. I do not recollect. If you have got the evidence there, it is probably so.

Q. And then, were you not asked: "Did you ever have any interest in any real estate there?" and didn't you say, "No, sir?"

A. I do not know.

Q. And then weren't you asked who owned the real estate on which the hotel stood, and didn't you answer, "E. M. Everitt owns that property"?

A. Yes.

Q. Now, you were under oath there, Doctor?

A. I presume so.

Q. Now, tell the jury why you have sworn in this case that you did own an interest in certain real estate in Winlock, and why on that occasion you swore you did not.

A. Well, if I did that, I probably thought I was being asked the question "Did I own it,"

to which I can consistently and truthfully say "No." I say that today.

Q. Doctor, I asked you a little while ago whether, at the time you had paid Buege for this property and it stood in the name of Mrs. Reinhardt, if you did not own it then. Don't you remember my asking you that a little while ago, and don't you remember saying that you did?

A. I do not remember now. Possibly.

Q. Why, Doctor, on that occasion down in the Superior Court in Chehalis County, when you were up on supplementary proceedings and you were asked, "Did you ever have any interest in real estate there?" why did you say "No, sir"?

A. I do not know as I did say it. If I did, that is the way I took it and construed it as having any interest. I had no interest in it any more than the furniture. That is all.

Q. At the time this property stood in the name of Mrs. Reinhardt, you owned it, didn't you?

A. Yes.

Q. Then, when they used this language, "Did you ever have any interest in any real estate there?" you understood that language to mean "Have you any interest in any now?"

A. Possibly I did; yes.

Q. And weren't you asked at that time "Do you recall the circumstances of buying a twelve

hundred dollar draft February 8 in the name of E. M. Everitt?" and didn't you answer, "I bought no such draft as that"?

A. Yes.

Q. And weren't you asked, "You swear you never bought such a draft as that?" and you said "No."?

A. Yes, that is what I said.

Q. And they asked you "From the U. S. National Bank?" and you said—

A. Yes, sir, I testified that I only owned some furniture in a hotel in Winlock. The man I sold it to went bankrupt. I threw him into bankruptcy. After he was thrown into bankruptcy, Mr. Benner, of Tacoma, was appointed trustee and he sold the furniture to Miss Everitt. She paid eight hundred dollars for it.

IV.

The Court further erred in permitting the witness, J. A. Cross, to testify over defendant's objection as to what plaintiff in error testified to in a certain proceeding had and held in the Superior Court of Chehalis County, Washington, in aid of proceedings supplementary to execution in the case of *John Forsgren, Plaintiff, vs. A. W. Lueders, Defendant*. The testimony was introduced for the alleged purpose of impeaching the testimony of defendant in error given on the trial of this action. The questions and answers put to and made by said witness in this connection being as follows:

(By MR. RIDDELL, Assistant U. S. Attorney.)

Q. What is your name?

A. J. A. Cross.

Q. What is your business?

A. Court reporter.

Q. Where?

A. Aberdeen, Washington.

Q. Do you know the defendant?

A. I do.

Q. Did you ever see him or know whether or not he testified in supplementary proceedings before Judge Mason Irwin?

A. He did.

Q. Were you present?

A. I was.

Q. Did you take down the testimony?

A. I did.

Q. Where are your notes?

A. I have got them here.

Q. The testimony in the supplementary proceedings?

A. No, I could not locate those notes. I misunderstood your question.

Q. Did you look for them?

A. Yes.

Q. And you are unable to find them?

A. Yes.

Q. I show you that paper and ask you if you know what it is?

A. This is a transcript of the defendant's

testimony in the supplementary proceedings of
A. W. Lueders.

Q. In the case I just asked you about?

A. Yes.

Q. You were present?

A. I was.

Q. How did you get this transcript? Who made it?

A. I did.

Q. Is it correct?

A. Yes.

Q. Can you testify to what Lueders said at that time from your memory?

A. No.

MR. LANGHORNE: What was your answer?

A. I cannot.

MR. RIDDELL: Can you by refreshing your recollections from this transcript?

A. Yes, sir.

MR. LANGHORNE: You have no independent recollection of what he testified to on that trial?

A. I have not.

MR. LANGHORNE: The only means you have of knowing is by reference to a transcript of your notes taken at the time?

A. That is all.

MR. LANGHORNE: I object to the testimony as absolutely incompetent. The witness

has no recollection whatever of what defendant testified to at that time.

THE COURT: Objection overruled and exception allowed.

MR. RIDDELL: I will ask you to refresh your memory by referring to that transcript and stating whether or not Dr. Lueders was asked whether he resided in Winlock, Washington?

MR. LANGHORNE: Will you refresh your recollection or are you just testifying from the transcript? Does the transcript recall to your mind affirmatively now what he testified to?

A. No.

MR. LANGHORNE: We renew our objection.

THE COURT: Do you care to examine further on qualifications?

MR. RIDDELL: After looking at the transcript, are you able to swear to what the doctor testified?

A. I am able to testify that this is a transcript of the notes taken at the time, but by reference to this transcript I cannot state that he testified to this. I haven't any recollection of him testifying to it.

Q. That is, you have not in your own mind?

A. No, sir.

Q. Do you know that is correct?

A. I do.

Q. Do you swear that it is correct?

A. I will swear that it is a correct transcript.

THE COURT: Objection overruled and exception allowed.

MR. RIDDELL: Did he state at that time—was he asked at that time whether he resided at Winlock and he answered “yes”?

A. Yes.

Q. Was he asked if he ever owned any property and he stated “yes”?

A. He did.

Q. Was he asked at that time “Did you ever own any real estate there”? and he said, “No, sir”?

A. He did.

Q. Was he asked, “Did you ever have any interest in any real estate there?” and did he say, “No, sir”?

A. He did.

V.

The Court further erred in denying defendant’s motion to set aside the verdict and grant a new trial on the ground that the testimony failed to show that defendant in error was guilty of the crime charged in the indictment, or of any crime.

ARGUMENT.

Some of the questions arising out of the assignments of error 1, 2, 3 and 4 can be grouped and argued together. The indictment, which consists of one count, charges that the plaintiff in error did on the 23rd day of February, 1912, commit the crime of concealing from his trustee in bankruptcy certain described real estate situated in Morrow county, Oregon. The manner or method of concealment is not set forth in the indictment. The lower court concluded that the indictment was good as against a demurrer, but required the District Attorney to furnish defendant with Bill of Particulars, setting forth the method or manner adopted by plaintiff in error in concealing the property from his trustee in bankruptcy. The Bill of Particulars so furnished set forth that plaintiff in error concealed the property described in the indictment by carrying the same in the name of one E. Maude Everitt. This is as far as the Bill of Particulars went. On the trial in the lower court, the Government, over the objection of counsel for the plaintiff in error, was permitted to show that on February 11, 1911, some six weeks prior to the filing of the petition in bankruptcy, and more than one year prior to the appointment of the trustee in bankruptcy, plaintiff in error purchased a draft in the sum of \$1,200.00 from the United States National Bank at Aberdeen, and further permitted proof that on February 13, 1911, two days later, plaintiff in error deposited the proceeds of this

draft in the Ladd & Tilton Bank at Portland, Oregon. The draft was purchased in the name of E. Maude Everitt and the certificate of deposit taken out in her name. It was, of course, the contention of the Government that the money represented by the draft was the property of the plaintiff in error, and the inevitable tendency of such testimony was to show that he was guilty of another and distinct crime than the one alleged in the indictment, and to prejudice the jury against him and his defense. The objection of counsel for plaintiff in error to this line of testimony was overruled by the trial judge in the following language.

“The only charge in the indictment is the secreting of the particular real estate described. Unless the jury believes the transaction about which this inquiry is made concerns the matter charged in the indictment, you will disregard the testimony.” (Tr., p. 46).

With all due deference to the learned trial judge, we wish to observe that the law makes it his duty and not that of the jury to pass upon competency, materiality and relevancy of testimony. He can't shirk that duty in the novel manner adopted by him in this case. However, the error in admitting this line of evidence did not stop with the testimony of Hoonan and Philliber. While the plaintiff was on the stand he admitted that prior to the making of the deed from Mrs. Reinhardt to Miss Everitt he owned the real estate described in that deed. While under

cross-examination and over our objection, the District Attorney was permitted to question the defendant as to whether or not in a certain proceeding in the Superior Court of Chehalis County, Washington, wherein one Forsgren was plaintiff, and plaintiff in error was defendant, he testified that he never did own any interest in this particular real estate described in the deed from Reinhardt to Everitt. And in rebuttal he also permitted the government to have read to the jury a transcript of his testimony in that proceeding, from which transcript it would appear that plaintiff in error had testified that he never owned any real estate at Winlock. The unmistakable drift of this testimony was for the sole purpose of leading the jury to believe that plaintiff in error was guilty of the crime of perjury. Had the plaintiff in error ever testified in any former proceeding that he had owned, or did own an interest in the real estate in Winlock, and had on trial of this action testified to the contrary, then it would have been permissible to have impeached him by showing that at a different time and place he had admitted owning an interest in the real estate in Winlock, and it could not have been successfully argued that because the tendency of such testimony was to show that plaintiff in error had committed the crime of perjury that the testimony would be inadmissible. But, under the circumstances, there was no occasion or reason whatsoever for introducing in evidence a statement made under oath by the plaintiff in error that he never owned any interest in the real estate in Winlock. As

we have said, plaintiff in error, upon trial of the present action, admitted that he had once owned an interest in this real estate, and as to whether or not he had at any other time and place, made a contrary statement was entirely collateral and irrelevant to the present inquiry. A variant statement, in order to be admissible for the purpose of impeachment, must be relevant to the matter at issue in the cause on trial.

10 Ency. P. & P., p. 294, --- Ed.;

U. S. vs. Hughes, 34 Fed. 732;

U. S. vs. White, 5 Cranch C. C., 38; Fed. Cas. No. 16675.

Sconce vs. Henderson, 102 Ill. 376;

Peck vs. Parchen, 52 Iowa, 46; 2 N. W., 597.

Smitson vs. Southern Pacific Co., 37 Oreg. 74; 60 Pac., 907.

State vs. Davidson, 70 N. W. 879;

Alger vs. Castle, 17 Atl., 727;

People vs. Cole, 59 Pac., 984;

State vs. Irwin, 71 Pac., 608;

Butler vs. Cooper, 42 Pac., 839;

Com. vs. McLaughlin, 122 Mass., 449;

Curran vs. Percival, 21 Neb., 434; 32 N. W., 213;

Patterson vs. Wilson, 8 S. E., 341;

Williams vs. Culver, 39 Oreg., 337; 64 P. 763.

Shephard vs. State, 59 N. W., 449;

Merchants Life Ass'n vs. Yoakum, 98 Fed., 251; 39 C. C. A. 56;

Steen vs. Santa Clara Valley M. & L. Co., 66 Pac., 321;

Stalcup vs. State, 146 Ind., 270; 45 N. E. 334;
Murphy vs. Backer, 67 Minn., 510; 70 N. W.
 799.

People vs. Ryan, 8 N. Y. S., 241.

That the admission of the testimony of Hoonan, Philliber and Cross had a tendency to prove that the plaintiff in error was guilty of crimes other than the crime alleged in the indictment, and that that was the sole purpose of the testimony is too plain for argument. Its admission was error of the most poisonous kind. The general rule is that on a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible.

Com. vs. Campbell, 155 Mass., 537, 30 N. E.
 72;

Com. vs. Jackson, 132 Mass., 16.

Com. vs. Campbell, 83 Am. Dec., 705;

People vs. Robertson, 89 N. W., 340;

Brown vs. State, 72 Miss., 997; 17 So. 278.

Boyd vs. U. S., 142 U. S., 450, 12 S. Ct. 292,
 35 L. Ed. 1077;

People vs. Arlington, 55 Pac., 1003;

People vs. Jones, 32 Cal., 80;

Underhill on Crim. Ev., Sec. 88;

Wharton, Crim. Ev., 9th Ed., Sec. 48;

Abbott, Trial Briefs, Crim. Trials, Sec. 598.

“The general rule of evidence applicable to

criminal trials is that the state cannot prove against the defendant any crime not alleged in the indictment, either as a foundation for a separate punishment or as aiding the proofs that he is guilty of the crime charged."

Bishop New Crim. Pro. Section 1120.

In *Coleman vs. People*, 55 N. Y., 81, it is laid down as follows:

"The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he has committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of similar character, or, indeed of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to unite evidence of several offenses to produce conviction for a single one."

In *People vs. Shea*, 147 N. Y., 78, 41 N. E., 505, the rule is thus stated:

"The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of crime for which he is on trial, may be said to have been assumed and consis-

tently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit . . . of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of twelve men. In order to prove his guilt it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

The Supreme Court of Mass. in *Com. vs. Jackson*, 132 Mass., 16, has said:

"The objections to the admission of evidence

as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues and thus divides the attention of the jury from the one immediately before it, and, by showing the defendant to have been a thief on other occasions, creates a prejudice which may cause injustice to be done him."

In *Shaffner vs. Com.*, 72 Pa., 60, 13 Am. Rep. 649, the rule is thus enunciated:

"It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that his having committed one crime, the depravity there exhibited makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of a commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the minds of the jurors to believe the prisoner guilty."

Such is the general rule. There are certain exceptions, however, to this rule, which cannot always

be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so relating to each other that proof of one tends to establish the others.

Wharton Crim. Ev., 10th Ed., Sec. 31;

Did the admission of the evidence complained of fall within any of the recognized exceptions to the general rule? To state the question is to argue it. No fact, which, on principle of sound logic, does not sustain or impeach a pertinent hypothesis, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial. The reasons for this rule are obvious. The sixth amendment to the Federal Constitution provides that the accused "shall be informed of the nature and cause of the accusation." To admit evidence of collateral facts is to oppress the accused by trying him on charges, the nature and cause of which he has not been informed and which he has made no preparation to meet, and by prejudicing the jury against him by making *prima facie* proof of alleged offenses that he is not prepared to disprove, or by proving certain facts from which an inference may arise that the accused has been guilty of some other crime than the one charged in the indictment. As was well said by the Supreme Court of Wisconsin, in *State vs. Paulson*, 118 Wis., 89, 94 N. W., 771:

“From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character, nor commissions of other specific, disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man, no more than the good, ought to be convicted of a crime not committed by him.”

Now, if the testimony relative to the purchase of the twelve hundred dollar draft from the U. S. National Bank at Aberdeen, and its subsequent deposit in the banking house of Ladd & Tilton, at Portland, Oregon, was not designed to show that plaintiff in error was guilty of another and distinct crime than the one laid in the indictment, then what was its purpose? What relevancy did such testimony have to the issue arising out of the charge laid in the indictment? The draft was purchased on February 11, 1911, six weeks before plaintiff in error filed his petition to be adjudicated a bankrupt and more than one year before the appointment of the trustee in bankruptcy. So far as the record in this case discloses, plaintiff in error was not contemplating bankruptcy at the time of the purchase of the draft in question. Neither was he contemplating a sale

or exchange of the Winlock property, conceding, for the sake of argument, that he controlled the title thereto, but, on the contrary, the testimony of P. E. Alvord (Tr., pp. 27-28-29) and Dr. Winnard (Tr., p. 39) affirmatively shows that the exchange of the two properties was never broached until May of 1911, some three months subsequent to the purchase of the twelve hundred dollar draft. Thus a perfectly innocent transaction was cloaked in the guise of a crime and paraded before the jury for the sinister purpose of awakening a prejudice against him that was futile to try to overcome. And the same purpose was also served when the lower court permitted testimony to show that plaintiff in error had at a previous time and place testified that he never owned any interest in the Winlock realty. Instead of confining the proof to the crime charged in the indictment, namely, concealing of certain real estate from his trustee in bankruptcy, plaintiff in error was tried for the alleged offense of concealing twelve hundred dollars in money from his trustee in bankruptcy, and also tried for the alleged crime of perjury. Not the slightest attempt was made on the part of the government to show that plaintiff in error was in possession of the sum of twelve hundred dollars after he was adjudged a bankrupt, but, on the contrary, contented itself with showing that some weeks prior to his adjudication of bankruptcy he purchased a draft at Aberdeen calling for the payment of the sum of twelve hundred dollars and afterwards took the draft to Portland and deposited the

same in a bank in that city, receiving in exchange a certificate of deposit calling for a like amount of money. The testimony, of course, shows that the draft was purchased in the name of Miss Everitt and the certificate of deposit was in her name, but the theory of the government was that the money represented by the draft and the certificate of deposit belonged to plaintiff in error. What relevancy this testimony had to the main issue is beyond the comprehension of the writer. Its admission finds no support in the text books or the decisions.

In *Jordan vs. Osgood*, 109 Mass., 457, in the trial of an action which presented the issue whether the defendant obtained the goods from the plaintiff by fraudulent representations, and also the issue whether he obtained the goods intending at the time not to pay for them, it was held that evidence of other frauds committed by the defendant about the time of obtaining the goods and making the alleged representation was not admissible upon either issue unless it appeared that such frauds and the obtaining of the goods in question were parts of one fraudulent scheme committed in the pursuance of a common purpose. In that case the court said:

“The fact that a defendant has committed a similar but distinct crime or fraud is not competent to prove that he committed the particular crime or fraud with which he is charged. It has no tendency to prove the proposition to be established by the plaintiffs, but is equally consistent

with an affirmative or negative decision of that proposition. The effect of such proof may be to produce such a state of mind in the jury to whom it is addressed, that a less weight of testimony satisfied them than would otherwise be necessary to produce conviction, but it does not directly tend to prove or disprove the matter in dispute. The admission of such evidence would introduce a multiplicity of collateral issues calculated to withdraw the attention of the jury from the real issues in the case; and it would operate unjustly to the defendant, as it requires him to explain his transactions with others without any notice or opportunity for preparation."

In *State vs. Bokien*, 14 Wash., 403, in which the defendant was charged with obtaining goods under false pretenses by means of a check drawn on a bank in which he had no funds, the state was permitted, over the objection of defendant, to introduce in evidence several checks drawn by him prior to the date of the one in question, and to prove that they had been presented to the bank by the persons to whom they were given and were not paid because the defendant had no funds on deposit and the defendant knew that payment thereof had been refused. In holding the admission of this testimony constituted a reversible error, the Supreme Court of Washington said:

"There was no connection whatever between

the several transactions which were permitted to be shown and that for which the defendant was being tried, and the evidence objected to was therefore incompetent for any purpose. We are of course aware there are exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged, but we are of the opinion that the evidence here admitted does not come within any of the exceptions * * *

The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information for the reason that it did not logically or legitimately show that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the purpose of showing defendant's motive, for that as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case and the previous transactions of the defendant, which were permitted to be shown, no more form a part of a single scheme than the several larcenies of a thief; and it certainly would not be competent in order to show that one had stolen certain property to prove that he committed larceny at a previous time. The evidence as to these facts which were not mentioned in the information must have been greatly prejudicial to the defendant, for it in effect com-

pelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged."

In *People vs. Schweitzer*, 23 Mich., 301, the learned judge who delivered the opinion of the court said:

"We see no legal ground upon which the witness Dunphy could have been allowed to testify to the commission by the defendant of another and distinct larceny from that for which he was on trial. The general rule is well settled that the prosecution are not allowed to prove the commission of another and distinct offense, though of the same kind with that charged, for the purpose of rendering it more probable in the minds of the jury that he committed the offense for which he is on trial; and this would be the natural and inevitable effect upon the minds of the jury, of the admission of such evidence, on whatever ground or pretense it might be admitted, and the defendant would thus be prejudiced on the trial of the offense charged, by proof which he has no reason to anticipate, of an offense for which he is not on trial, and to which, when properly called upon to defend, he may have a perfect defense."

In *Boyd vs. U. S.*, 35 L., Ed. 1077, the Supreme Court of the United States reversed a conviction for murder because of the erroneous admission of testi-

mony designed to show that the defendant had been guilty of several robberies committed prior to the day of the alleged murder. The admissibility of the evidence was attempted to be sustained on grounds discussed in the opinion on page 1078 of the reported case. In holding the admission of this testimony erroneous the court said:

“Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afford no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime.”

In *Marshall vs. U. S.*, 197 Fed., 511, defendant was indicted of devising a scheme to defraud and using the U. S. mail in furtherance thereof. On the trial the government was permitted to introduce

testimony tending to show that defendant had engaged in other similar schemes. In holding that this testimony was inadmissible, the Circuit Court of the United States for the second circuit said:

“In order to prove guilty intent the government introduced testimony showing the defendant's connection with another similar scheme. The admission of such testimony is an exception to the general rule. It is allowed where a guilty intent must be shown, to meet the presumption of accident or mistake. Such is the case of passing counterfeit money, or filing undervaluing invoices ‘with intent to evade’ the custom laws or making representation ‘with intent’ to obtain property thereby. When the government has proved that the defendant has passed counterfeit coin, or has filed an undervaluing invoice, or has made false representations, the case is not fully made out. Every one of these things might be done innocently in one instance, but hardly in many instances. The exception ought not to be extended. Such testimony certainly prejudices the defendant even if the court charges the jury that it is admitted only to show intent. It is not needed in the case of a scheme to defraud. It would be impossible to find the existence of a scheme to defraud without finding also the fraudulent intent of the person who devised it. The moment the fraudulent scheme is established, there is no necessity for resorting to

other transactions, as in the excepted cases mentioned. No one can have an innocent intent in devising a fraudulent scheme."

II.

Another objection to the reception of the evidence complained of is grounded upon the proposition that the bill of particulars which the lower court required the government to furnish plaintiff in error failed to apprise defendant that he would be confronted with this species of evidence upon the trial. It is a well grounded rule that on prosecution for crime the court will limit the government in its evidence to those facts set forth in the bill of particulars.

U. S. vs. Adams Ex. Co., 119 Fed., 240;

Regent vs. People, 96 Ill., App., 189;

Young vs. State, 26 Ohio Cir. Ct. R., 747.

"Another object of a bill of particulars is to prevent surprise on the trial by furnishing that information which a reasonable man would require respecting the matters against which he is called to defend himself; and by thus limiting the generality of the pleadings its effect is to confine the proof to the particulars specified."

3 Ency. of P. & P., pp. 519-20 and authorities there cited.

"Fraud in criminal prosecutions cannot be proved by evidence not within the scope of a bill of particulars furnished."

McDonald vs. People, 126 Ill. 150, 9 Am. St. Rep. 547; 18 N. E. 817.

See also: *Dudley vs. Duval*, 29 Wash., 528; 1 Bishop New Crim. Pro., p. 643;

State vs. Van Pelt, 49 S. E., 177.

III.

The action of the court in permitting the witness Cross to contradict the testimony of plaintiff in error by reading from a transcript of his testimony given in the supplemental proceedings in the case of *Forsgren vs. Lueders*, was palpably erroneous. The witness, Cross, testified that he had no independent recollection whatsoever of what plaintiff in error testified to in that proceeding and that a reference to the testimony would not in any manner refresh his recollection. Notwithstanding this positive statement of the government's witness, the lower court, over the protest and objection of counsel for plaintiff in error, permitted Cross to read from his transcript the purported testimony of plaintiff in error in the proceeding hereto referred to. This very question has twice been before the Supreme Court of the State of Washington. In case of *State vs. Freidrich*, 4 Wash., 209, counsel for the defendant attempted to contradict the testimony of a witness by having the stenographer who had reported his testimony in a former proceeding read his notes of the witness' former testimony. The state's objection to the reading was sustained, and on appeal the ac-

tion of the lower court in this respect was assigned as error. The court said:

"We do not think appellant's proposition that he should have been allowed to read the long hand notes can be sustained. He was seeking to prove a negative, viz., that Longstaff had not testified on the first trial that he had spoken to appellant about the ring on his finger. Bowman was present and competent to testify as to that. He could have been asked whether Longstaff had testified as he claimed; and if unable to answer without his notes he could have been permitted to refer to them to refresh his recollection. But, independent of him, his notes had no standing in court. *State vs. Baldwin*, 36 Kan., 1. Counsel, we think, errs upon this point through his viewing Bowman as an official of the court. He cites *People vs. Morine*, 61 Cal., 367, where the reading of reporter's notes was sustained. The only point there considered, however, was whether the oath of an official reporter to the correctness of his notes, at the trial, was equivalent to his certificate required by statute, and the court, in effect, said it was. But this was under the California statute, which makes reporter's notes, when written out and certified, *prima facie*, a correct statement of testimony. Cal. Code of Civ. Proc., Sec. 273. We have no such basis for the ruling asked."

This ruling in the above case was adhered to in *Kellogg vs. Scheuerman*, 18 Wash., 293.

In conclusion, we have to say that plaintiff in error was denied that fair and impartial trial to which he was entitled under the constitution and laws of the land. Erroneous testimony of the most damaging character was admitted against him, over the protest and objection of his counsel. If error was admitted in the admission of the testimony of the witnesses, Hoonan, Philliber and Cross, it needs no argument or citation of authorities to demonstrate how prejudicial to the rights of defendant its admission was. The rule that we contended for in the lower court—the rule that we contend for here, so universally recognized and so firmly established in all English-speaking lands—is recorded in that jealous regard of the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened spirit which, through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until his guilt of the particular crime charged has been proven beyond a reasonable doubt. The judgment appealed from should be reversed with directions to grant a new trial.

Respectfully submitted,

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